

2010

The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100

Guyon Knight

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Guyon Knight, *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100*, 78 Fordham L. Rev. 1875 (2010).

Available at: <https://ir.lawnet.fordham.edu/flr/vol78/iss4/6>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100

Cover Page Footnote

J.D. Candidate, 2011, Fordham University School of Law. My thanks to Professors Howard M. Erichson and Michael M. Martin for their invaluable guidance.

THE CAFA MASS ACTION NUMEROSITY REQUIREMENT: THREE PROBLEMS WITH COUNTING TO 100

Guyon Knight*

This Note examines the mass action provision of the Class Action Fairness Act of 2005 (CAFA) and the difficulties courts have encountered when applying its seemingly simple 100-person numerosity requirement. “Mass actions” are a broad category of nonclass aggregate litigation over which CAFA extended federal jurisdiction. This Note examines three interpretations of the numerosity requirement advanced in recent cases. These interpretations have advocated, in turn, not finding a mass action when a case has more than 100 formally joined plaintiffs, recognizing the existence of a single mass action broken up among parallel suits with fewer than 100 plaintiffs, and finding a mass action in cases with only a single, representational plaintiff. These arguments concerning the meaning of the mass action numerosity requirement stem from the confluence of three factors: Congress’s intent for courts to interpret CAFA broadly, the similarities between class actions and nonclass aggregate litigation, and ambiguities in the mass action statute. Although no perfect reading of the statute is possible, this Note suggests that courts strictly interpret the statute going forward, only counting formal parties to a single action in order to determine if CAFA’s numerosity threshold has been achieved.

TABLE OF CONTENTS

INTRODUCTION.....	1876
I. AGGREGATE LITIGATION, CAFA, AND MASS ACTIONS	1878
A. <i>Aggregate Litigation: An Overview</i>	1879
B. <i>The Class Action Fairness Act of 2005</i>	1884
C. <i>CAFA Mass Actions</i>	1887
1. <i>Mass Actions: The Plain Language</i>	1887
2. <i>Mass Actions: The Legislative History</i>	1888
3. <i>Mass Actions: The Statutory Ambiguities</i>	1892
II. THREE WAYS TO COUNT TO 100: NUMEROSITY WITH MORE THAN 100 PARTIES, FEWER THAN 100 PARTIES, AND WITH A SINGLE PARTY.....	1895

* J.D. Candidate, 2011, Fordham University School of Law. My thanks to Professors Howard M. Erichson and Michael M. Martin for their invaluable guidance.

A. <i>Mass Actions with More than 100 Parties</i>	1896
1. <i>Bullard v. Burlington Northern Santa Fe Railway Co.</i>	1896
2. <i>Cooper v. R.J. Reynolds Tobacco Co.</i>	1897
B. <i>Mass Actions with Fewer than 100 Parties</i>	1900
1. <i>Tanoh v. Dow Chemical Co.</i>	1900
2. <i>Brown v. Bayer Corp. and Mobley v. Cerro Flow Products, Inc.</i>	1906
C. <i>Mass Actions with One Party</i>	1908
1. <i>Louisiana ex rel. Caldwell v. Allstate Insurance Co.</i>	1908
2. <i>After Caldwell: Adoption and Dissent</i>	1914
D. <i>Three Ways To Count to 100</i>	1919
III. COUNTING TO 100: A LIMITED READING OF THE MASS ACTION PROVISION.....	1920
A. “ <i>Claims of . . . persons</i> ”	1922
1. Cases Examining “ <i>Claims of . . . persons</i> ”: <i>Caldwell, Kitazato, Anwar, and CalPERS</i>	1922
2. “ <i>Claims of . . . persons</i> ” Should Be Limited to Parties....	1924
B. “ <i>Proposed to be tried jointly</i> ”	1925
1. Cases Examining “ <i>Proposed to be tried jointly</i> ”: <i>Bullard, Cooper, and Tanoh</i>	1925
2. “ <i>Proposed to be tried jointly</i> ” Should Be a Limited Inquiry	1927
CONCLUSION	1929

INTRODUCTION

Counting to 100 should be simple. However, in the context of the Class Action Fairness Act of 2005 (CAFA, or the Act)¹ and “mass actions” this exercise is considerably more complicated. This Note examines the sources of the difficulty in assessing the numerosity requirement of CAFA mass actions, and cases where courts have wrestled with the meaning of the number 100.

As opposed to CAFA’s main concern—class actions—mass actions are nonclass aggregate litigation. CAFA defines mass actions, in brief, as “any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact.”² CAFA did not invent this breed of nonclass aggregation, but it formally recognized it and extended federal jurisdiction over these cases.³

CAFA’s mass action provision was born from the realization that, despite their formal differences, nonclass aggregate litigation can resemble “class

1. Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

2. 28 U.S.C. § 1332(d)(11)(B)(i) (2006).

3. See *infra* Part I.A.

actions in disguise.”⁴ Thus, according to Congress, the evils inherent in class actions that CAFA hoped to eliminate were equally present in mass actions.⁵ In both, plaintiffs’ lawyers could game the procedural system to the detriment of their client and, most importantly for Congress, defendants.⁶ Congress’s prescription for mass actions was the same that they applied to class actions: a broad grant of federal jurisdiction over this breed of nonclass aggregate litigation.⁷ Furthermore, Congress intended courts to interpret its grant of federal jurisdiction as broadly as possible.⁸ While Congress made its intentions clear, the mass action statute is not. The confluence of Congress’s broad intent, the similarities between class and nonclass aggregate litigation, and the statute’s ambiguous language make even the seemingly simple task of counting to 100 a subject of considerable conflict. That conflict centers upon two specific ambiguous phrases in the mass action statute: “claims of . . . persons” and “proposed to be tried jointly.”⁹ Part I of this Note outlines these sources of difficulties in applying the mass action’s numerosity requirement.

In Part II, this Note examines three lines of cases that have attempted to apply CAFA’s ambiguous language. In the cases of *Bullard v. Burlington Northern Santa Fe Railway Co.*¹⁰ and *Cooper v. R.J. Reynolds Tobacco Co.*,¹¹ courts rejected the argument that formally joining more than 100 parties to a complaint does not satisfy the mass action’s “proposed to be tried jointly” requirement. This Note argues in Part III that the courts in these cases were correct to dismiss this argument. However, even the relatively clear application of the statute in these cases can lead to bizarre results. In *Cooper*, the defendant’s litigation strategy could have potentially resulted in a mass action made up of individual trials for more than 100 plaintiffs. By contrast, in *Tanoh v. Dow Chemical Co.*,¹² plaintiffs advanced the argument that joining ninety-nine plaintiffs in parallel actions did not trigger the “proposed to be tried jointly” requirement, despite the fact that, considered as a single case, the claims would clearly constitute a mass action. This Note argues that the U.S. Court of Appeals for the Ninth Circuit correctly ruled in the plaintiffs’ favor in *Tanoh*. However, a strict reading of CAFA’s language in that case left cases of “national importance” in state court, contrary to Congress’s intent.¹³

4. S. REP. NO. 109-14, at 47 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 44; see also *infra* note 85 and accompanying text.

5. See *infra* Part I.C.2.

6. See *infra* notes 47–53, 85–87 and accompanying text.

7. See *infra* Part I.B, C.1.

8. See *infra* Part I.B, C.2.

9. 28 U.S.C. § 1332(d)(11)(B)(i) (2006).

10. 535 F.3d 759 (7th Cir. 2008); see also *infra* Part II.A.1.

11. 586 F. Supp. 2d 1312 (M.D. Fla. 2008); see also *infra* Part II.A.2.

12. 561 F.3d 945 (9th Cir.), cert. denied, 130 S. Ct. 187 (2009); see also *infra* Part II.B.

13. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5; see also *infra* Part I.B.

Finally, in *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*,¹⁴ the U.S. Court of Appeals for the Fifth Circuit examined the meaning of CAFA's phrase "claims of . . . persons." In *Caldwell*, the defendants argued that a court could count nonparties as "persons" in order to satisfy the mass action numerosity requirement. The Fifth Circuit accepted that argument and held that the "real parties in interest" in a *parens patriae* action were equivalent to the mass action provision's "claims of . . . persons." Although one court has appeared to agree with *Caldwell*'s reasoning, other courts have rejected this argument in similar cases and refused to look past the formal parties to an action in order to count 100 "persons."¹⁵ This Note argues that these courts have interpreted the statute correctly and that *Caldwell* reached the wrong result.

The arguments advanced in these cases are made possible by CAFA's two key ambiguities: "claims of . . . persons" and "proposed to be tried jointly." In Part III, this Note suggests readings of these two phrases that clarify the mass action numerosity requirement and appropriately limit its reach going forward. This Note argues that "claims of . . . persons" should be read to apply solely to parties—a reading that best comports with the language of the statute as a whole and with the intent of Congress. As for "proposed to be tried jointly," this Note argues that courts should limit their inquiry to claims that are formally part of a single action or have been properly consolidated. While this proposed reading would not capture all of the cases of national importance that Congress sought to bring into federal court, this interpretation is the most coherent reading of the statute as a whole. However, this Note concludes with a more fundamental realization prompted by the mass action's numerosity provision: it is unworkable. The same lack of formal structure that spawned CAFA's mass action provision makes it impossible to capture the flexible category of nonclass aggregate litigation with any clear rule. In CAFA mass actions, the clarity and simplicity of the number 100 is an illusion.

I. AGGREGATE LITIGATION, CAFA, AND MASS ACTIONS

The problems courts have encountered in applying the mass action numerosity requirement stem from three sources: the fundamental similarities between class actions and nonclass aggregate litigation, Congress's clear intent that CAFA and the mass action be interpreted broadly, and the mass action statute's ambiguous language. This part introduces these three sources of the arguments examined in Part II. This part first gives an overview of aggregate litigation, some of the problems it presents, and the underlying similarities between formal class actions and nonclass aggregate litigation. This part then turns to CAFA and introduces the statute. Next, this part examines the mass action provision in detail, including its legislative history. This part concludes with a closer

14. 536 F.3d 418 (5th Cir. 2008); *see also infra* Part II.C.1.

15. *See infra* Part II.C.2.

examination of the ambiguities in the mass action provision that have given rise to the cases discussed in Part II—specifically, “claims of . . . persons” and “proposed to be tried jointly.”

A. Aggregate Litigation: An Overview

In simplest terms, aggregate litigation “is a single lawsuit that encompasses claims or defenses held by multiple parties or represented persons.”¹⁶ Beneath the surface of this broad definition, though, lies a multitude of formal and informal mechanisms bringing together the claims of parties and nonparties both inside and outside of court.¹⁷ In all of these forms of aggregation, participants surrender some degree of control over the litigation of their claims.¹⁸ Significant differences exist, however, in the law’s treatment of these minimally involved persons—most strikingly, between the handling of class actions versus nonclass aggregate litigation. Both of these broad categories of litigation share the problems begat by absent or nonparticipatory parties. To counter these problems, class litigation proceeds within a formal structure that assigns the court a significant role in protecting the interests of absent claimants. The court, however, does not have a formal role in managing these issues in the panoply of nonclass aggregating devices that have evolved partly in response to the procedural hurdles of class actions. This section introduces these forms of aggregate litigation and the problems they present.

The modern Rule 23 was intended, in part, to encourage cases of small individual value to be bundled together and brought into federal court where federal judges could protect rights that state courts had not.¹⁹ Under the Rule’s framework, nonparty plaintiffs can be bound by a court’s ruling, provided that their claims are adequately represented and suitable for class adjudication.²⁰ However, ruling on the claims of absent parties presents serious questions of due process and stands at “quite a distance from the

16. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02(a) (Proposed Final Draft 2009).

17. See generally Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000).

18. See, e.g., John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677–84 (1986); Erichson, *supra* note 17, at 464–65.

19. See Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1485–89 (2008); Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: “The Political Safeguards” of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929, 1938–44 (2008) (discussing the redrafting of Rule 23 in the 1960s and the drafters’ intent). On the history of class actions and representative litigation, see generally Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977).

20. See FED. R. CIV. P. 23(a)–(b).

'day in court' ideal of Anglo-American jurisprudence."²¹ The absence of individual representation in class actions also opens the door to conflicts of interest, both between attorneys and those they represent, and among present and future claimants.²²

The Federal Rules of Civil Procedure (Federal Rules, or Rules), and courts applying them, display an overarching concern with the procedural rights of these absent parties.²³ Rule 23 attempts to protect their interests by giving judges an active role in scrutinizing the makeup of classes, class claims, and the adequacy of representation, thereby managing potential conflicts.²⁴ The U.S. Supreme Court has emphatically confirmed the importance of this inquiry, even if the parties request class certification for settlement only and never intended to go to trial.²⁵ Judicial control thus

21. Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 347–66 (discussing the due process issues of class actions and the limits of the Federal Rules of Civil Procedure for properly considering them); Samuel Issacharoff, *Preclusion, Due Process, and the Right To Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1058 (2002) [hereinafter Issacharoff, *Preclusion*]; see, e.g., *Hansberry v. Lee*, 311 U.S. 32, 42 (1940) ("[In class suits,] there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it." (citing *Chi., Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 235 (1897))). But cf. Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 970–71 (1993) ("I believe that what the Constitution guarantees is not a right of participation, but rather what I will call a 'right of representation': not a day in court but the right to have one's interest adequately represented.").

22. See, e.g., JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 61–66 (1995) (outlining conflicts, including the potential for conflict between present and future, unrepresented claimants); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 896–917 (1987) (describing practices of entrepreneurial plaintiffs' litigators and conflicts of interests they implicate); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 163–67 (2003) (describing class counsel as monopolistic, a dynamic that can place some high-value claimants at risk).

23. The concern with the due process rights of absent plaintiffs is especially visible when nonparties are permitted to opt out of class litigation or settlement. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("[W]e hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court."); see also, e.g., Issacharoff, *Preclusion*, *supra* note 21, at 1058 ("[A] case can be made that due process may be satisfied only when, as with the consent to personal jurisdiction under *Shutts*, an absent class member is insured notice and the ability to opt out."); Brian Wolfman & Alan B. Morrison, *What the Shutts Opt-Out Right Is and What It Ought To Be*, 74 UMKC L. REV. 729, 742–43 (2006) ("*Shutts*' due process holding is best understood as premised on each class member's property interest in a cause of action that, if the class member so chooses, must be disposed of by the owner of that interest and not someone else claiming to be the owner's representative.").

24. See FED. R. CIV. P. 23(c)(1)(A) ("[T]he court must determine by order whether to certify the action as a class action."); see also John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1423–34 (2003) (outlining FED. R. CIV. P. 23(a)–(c) and advocating the elimination of the "descriptive categories" of Rule 23: limited funds and the risk of inconsistent adjudication).

25. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("[O]ther specifications of [Rule 23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement

acts as a champion for the interests of absent parties by, in part, serving as a surrogate for client consent.²⁶

However, not all aggregate litigation is class litigation. The Federal Rules and procedural statutes provide other means to bind a large number of parties,²⁷ including joinder,²⁸ interpleader,²⁹ Multidistrict Litigation (MDL),³⁰ consolidation,³¹ and multiparty, multiforum litigation.³² In addition, enterprising lawyers have aggregated parties and claims in numerous ways outside of the formal constraints of the Federal Rules.³³ This array of nonclass aggregating techniques has evolved partially in response to the perceived limitations of the class device, brought on by the very judicial due process scrutiny that allows the class action to be used

context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.”); *see also* FED. R. CIV. P. 23(e) (settlement of class actions).

26. *See, e.g.,* Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 41–42 (2009).

27. *See* Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1485–99 (2005) (discussing forms of nonclass joinder).

28. FED. R. CIV. P. 19–20.

29. 28 U.S.C. § 1335 (2006); FED. R. CIV. P. 22.

30. 28 U.S.C. § 1407.

31. FED. R. CIV. P. 42(a). This Rule allows the trial court, at its discretion, to consolidate actions pending “before the court” that involve a common question of law or fact. *See id.* The court may consolidate for “hearing or trial [of] any or all matters at issue in the actions.” FED. R. CIV. P. 42(a)(1). Courts have held that cases improperly removed from state court are not “before the court” and thus may not be consolidated pursuant to the Rule. *See, e.g.,* U.S. *ex rel.* Owens-Corning Fiberglass Corp. v. Brandt Constr. Co., 826 F.2d 643, 647 (7th Cir. 1987); *Lecker v. Bayer Corp.*, No. 09-991-GPM, 2010 WL 148627, at *4 (S.D. Ill. Jan. 13, 2010) (“[A] federal court can neither acquire subject matter jurisdiction through consolidation of cases nor consolidate cases as to which it lacks such jurisdiction.”); *Mourik Int’l B.V. v. Reactor Servs. Int’l, Inc.*, 182 F. Supp. 2d 599, 602 (S.D. Tex. 2002) (“Because the removal was improper, this Court’s consolidation order was also improvident.”).

32. 28 U.S.C. § 1369.

33. *See* Erichson, *supra* note 17, at 386–408 (describing nonclass aggregating techniques); *see also* Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 530–43 [hereinafter Erichson, *Beyond the Class Action*] (same). For an early account of informal coordination on mass tort cases, *see* Paul D. Rheingold, *The Development of Litigation Groups*, 6 AM. J. TRIAL ADVOC. 1 (1982).

fairly.³⁴ These alternate forms of aggregation have developed even though Rule 23 has been stretched far beyond the uses intended by its framers.³⁵

The innovative nonclass aggregation devices that lawyers have dreamed up do not share the procedural hurdles contained in Rule 23, but they do share many of the challenges and conflicts of class actions. Once the number of parties to a suit is large enough, even nonclass mass litigation “tends toward de facto class litigation. . . . in the sense that plaintiffs’ outcomes depend upon the work of lawyers who seek to maximize the aggregate recovery, and with whom most plaintiffs have no meaningful individual relationship.”³⁶ It is no simple task to gain the imprimatur of informed client consent for this type of aggregation. Firstly, individual claims are frequently scouted out by small-scale firms, then passed along to the primary lawyer on the case, with whom the individual plaintiffs have no relationship.³⁷ Moreover, the notion of consent in nonclass aggregation is inherently problematic since a lawyer may think it wise to act in the best interests of the group as a whole, not the individual consenting plaintiffs.³⁸ The limits of client consent and control are especially clear in aggregate settlement, where conditions of a settlement deal can lead to client coercion and where individual parties can affect the dispositions of others’ claims with a form of veto power.³⁹

34. See, e.g., Cabraser, *supra* note 27, at 1481 (“Utterly absent from *Rhone-Poulenc*’s diatribe against class certification was any recognition that the victims had corresponding rights. Indeed, *Rhone-Poulenc* and its progeny exhibited no consciousness that consigning common issues to individual adjudication denies due process to the victims of mass wrongs.” (discussing *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995))). In a forthcoming article, Professor Richard Nagareda argues that the evolution of aggregate litigation is, in part, an inevitable result of the limits of the class action as a procedural device. See Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. (forthcoming Sept. 2010) (manuscript at 8–9), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1506460. Nagareda, however, does not see these limits as “hypertechnical bugaboos,” but rather as a proper reaction to the bargaining disparity of the class action device. See *id.*

35. See, e.g., Judith Resnik, *From “Cases” to “Litigation,”* LAW & CONTEMP. PROBS., Summer 1991, at 5, 9–17 (noting that mass torts have become a staple of class action litigation, although Rule 23’s framers stated that such cases were inappropriate for class disposition).

36. Erichson, *Beyond the Class Action*, *supra* note 33, at 526.

37. See *id.* at 532–39.

38. See *id.* at 553–75 (arguing that lawyers should conceive of their ethical duty as running towards the group as a whole but also allow the client autonomy at the outset and settlement of litigation).

39. See Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1792–95 (2005) (outlining a range of settlement types based on the percentage of consenting claimants required to finalize the agreement); Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1185 (2009) (“[I]f anything, the problem with large nonclass cases may well be not the perceived lack of control by individual claimants, but just the opposite: the ability of holdout claimants to block resolution of the entire case.”). The *Principles of the Law of Aggregate Litigation* proposes an alternative to the current aggregate settlement rule, which currently requires individual informed consent by each plaintiff. See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *supra* note 16, § 3.17(a)–(e). The new proposal would allow parties to agree to

Yet even as these cases take on these essential characteristics of class actions, they come without the “judicial quality control” required by Rule 23.⁴⁰ Not only do these courts lack formal procedural devices to manage due process issues, but they have also been prevented from using innovative techniques, such as “virtual representation” and binding bellwether trials, to efficiently handle complex cases and absent nonclass parties.⁴¹ Courts can still play a role in managing nonclass cases, but rather than scrutinizing due process concerns, their role tends towards ensuring efficiency, for example, by using nonbinding bellwether trials to properly price claims and encourage settlement.⁴²

In response to the limitations of court assurances of due process in nonclass aggregation, academics have proposed a wide variety of means for protecting the interests of absent or inactive parties. The proposed solutions have included focusing on the ethics rules to ensure informed client consent,⁴³ encouraging increased cohesion and participation by litigation groups,⁴⁴ and properly incentivizing the attorney-client relationship to reduce conflicts.⁴⁵ Notably, the majority of these proposed solutions have

be bound by a settlement offer, provided that, before negotiations begin, a “substantial majority” vote to be bound by the settlement agreement. *See id.* § 3.17(b).

40. *See* Elizabeth Chamblee Burch, *CAFA’s Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2532 (2008) (arguing that the Class Action Fairness Act of 2005 (CAFA) will lead to fewer class certifications, leading, in part, to informal collective proceedings that are less procedurally fair).

41. *See* *Taylor v. Sturgell*, 128 S. Ct. 2161, 2178 (2008) (rejecting virtual representation, by which a nonparty could have been bound by a judgment, provided he shared an “identity of interests” with the party to the judgment); *see also* Nagareda, *supra* note 34, at 42 (“The preclusive effect envisioned would operate with respect to nonparties, such as to be unconstitutional in the absence of agreement on the part of the individual plaintiffs involved.” (citing *Taylor*, 128 S. Ct. at 2172)). On binding bellwether trials, *see* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 581 (2008) (noting that these “experiments were prematurely ended, perhaps due to the influence of a Fifth Circuit decision holding bellwether trials unconstitutional on Seventh Amendment grounds” (citing *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 320–21 (5th Cir. 1998))).

42. *See* Lahav, *supra* note 41, at 581; *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.315 (2004) (noting that bellwether trials can “enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis and what range of values the cases may have if resolution is attempted on a group basis”). Lahav highlights cases following the attacks of September 11, 2001, where bellwether trials on the issue of damages alone encouraged several plaintiffs to settle. *See* Lahav, *supra*, at 580–81.

43. *See* Erichson, *Beyond the Class Action*, *supra* note 33, at 529 (“In non-class litigation, we can accomplish the same objectives by looking to lawyers’ professional obligations concerning conflicts of interest and aggregate settlements. Applying the rules of professional conduct in light of the commonalities between class actions and non-class collective representation, lawyers can create opportunities for autonomous client decisions at the outset and at settlement, as a substitute for client autonomy in the course of litigation and negotiation.”).

44. *See* Burch, *supra* note 26, at 46–57 (arguing that small-scale litigation group cohesion could partially redress the lack of client contribution to aggregate litigation, drawing on group theory and social psychology).

45. *See* Paul H. Edelman et al., *The Allocation Problem in Multiple-Claimant Representations*, 14 SUP. CT. ECON. REV. 95, 102–11 (2006) (arguing that a properly

been strictly private, nonjudicial approaches to the procedural problems presented by nonclass aggregate litigation.⁴⁶

This review of aggregate litigation has introduced the context in which Congress passed CAFA. As shown above, the formal distinction between class and nonclass aggregate litigation is not as clear as the Rules make it seem. Both forms of litigation present significant problems of ensuring the due process rights of absent claimants. While these problems are shared, the means of addressing these questions differ significantly in class versus nonclass actions. Judges are given formal responsibilities in class actions to protect the interests of absent parties, while in nonclass aggregate litigation, judges have a more limited role, leading to a range of proposed private means to address these concerns. Congress was well aware of the problems created by class actions, and of the indistinct line between these cases and nonclass actions. CAFA's drafters, though, had a significant additional concern—that federal courts should also protect the interests of defendants in aggregate litigation.

B. *The Class Action Fairness Act of 2005*

As much as courts and commentators have been concerned with the due process rights of claimants in aggregate litigation, Congress, by passing CAFA, expressed its firm conviction that the opponents of class actions deserve heightened protection.⁴⁷ CAFA was enacted in February 2005⁴⁸ after years of aggressive lobbying and partisan wrangling. When it finally passed, the Senate Judiciary Committee made no secret of its motivations: "By now, there should be little debate about the numerous problems with our current class action system. A mounting stack of evidence reviewed by the Committee demonstrates that abuses are undermining the rights of both plaintiffs and defendants."⁴⁹ Class actions were deeply flawed, and the Report of the Senate Judiciary Committee highlighted several issues that

designed contingent fee arrangement can efficiently address principal-agent problems—the failure for advocates to maximize aggregate recovery and misallocation of recovery—in aggregate litigation).

46. *But see* Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 424–36 (2007) (encouraging the development of a humanized court bureaucracy to handle mass claims and arguing that judges are both competent to handle these claims and that the courts are needed to administer them).

47. Congress's intent in this Note is gleaned from CAFA's legislative history, primarily contained in the Report on the Act of the Senate Judiciary Committee. S. REP. NO. 109-14 (2005), *reprinted* in 2005 U.S.C.C.A.N. 3. CAFA was also the subject of debates in both the Senate and the House of Representatives. Finally, President George W. Bush issued a signing statement on the day CAFA was enacted. *See* Remarks on Signing the Class Action Fairness Act of 2005, 1 PUB. PAPERS 270 (Feb. 18, 2005). There is a difference between noting Congress's intent in passing CAFA and using that intent to interpret the statute. On the latter, *see infra* Part I.C.2.

48. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

49. S. REP. NO. 109-14, at 4, *reprinted* in 2005 U.S.C.C.A.N. at 5.

disadvantaged defendants, including judicially forced settlements that “essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits.”⁵⁰ Some state court judges, the Report also noted, deprived defendants of their due process rights by cramming through class certifications without giving them the “opportunity to tell [their] side of the story.”⁵¹ Despite CAFA’s profession of concern for plaintiffs taken advantage of by lawyers gaming the procedural system,⁵² commentators have almost universally labeled the Act prodefendant.⁵³

CAFA’s design to achieve this goal was a dramatic rewriting of the jurisdictional lines between state and federal courts.⁵⁴ Under CAFA, Congress mandated that a large amount of class and nonclass cases—“interstate cases of national importance”—would now fall under the jurisdiction of the federal courts.⁵⁵ As significant as the Act’s jurisdictional policy was, Congress urged courts to expand their reach even further:

[T]he definition of “class action” is to be interpreted liberally. Its application should not be confined solely to lawsuits that are labeled “class actions” by the named plaintiff or the state rulemaking authority. Generally speaking, lawsuits that resemble a purported class action should be considered class actions for the purpose of applying these provisions.⁵⁶

CAFA’s impact on the jurisdictional balance between state and federal courts is still being assessed,⁵⁷ but Congress’s overall motivation and intent

50. *Id.* at 20, reprinted in 2005 U.S.C.C.A.N. at 21.

51. *Id.* at 21–22, reprinted in 2005 U.S.C.C.A.N. at 22.

52. See, e.g., Class Action Fairness Act of 2005 § 3, 28 U.S.C. §§ 1711–1715 (2006). This “Class Action Bill of Rights” “invites public participation in class action settlements and regulates some settlement terms.” Laurens Walker, *The Consumer Class Action Bill of Rights: A Policy and Political Mistake*, 58 HASTINGS L.J. 849, 849 (2007).

53. See, e.g., Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1867–79 (2008) (arguing that CAFA is unambiguously prodefendant); Edward F. Sherman, *Consumer Class Actions: Who Are the Real Winners?*, 56 ME. L. REV. 223, 230 (2004) (“The intent of the Act is obviously more to shield defendants than to protect class members from abuses.”). But cf. Richard L. Marcus, *Assessing CAFA’s Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1789 (2008) (“[O]ne could even make an argument that in the long run CAFA will inure to the benefit of consumer plaintiffs.”).

54. See, e.g., Burbank, *supra* note 19, at 1441 (CAFA breaks “from a nearly uniform history of congressional contraction of diversity jurisdiction.”). But see Marcus, *supra* note 53, at 1789 & n.117 (citing class actions filed in California for the proposition that CAFA has not moved these actions out of state court wholesale); cf. Resnik, *supra* note 19, at 1938–56 (arguing that CAFA’s federalization of cases of “national importance” mirrors the redrafting of Rule 23 in the 1960s based on a desire to expand federal jurisdiction in order to protect plaintiffs).

55. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5. The Act stated that this change would “restore the intent of the framers of the United States Constitution.” *Id.*

56. S. REP. NO. 109-14, at 35, reprinted in 2005 U.S.C.C.A.N. at 34.

57. See Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1750–62 (2008) (finding that the number of diversity of citizenship class

were clear: class actions are a problem brought on by clever lawyers and overly permissive state courts, and federal jurisdiction is at least the first part of an answer.⁵⁸

By its plain language, CAFA gives federal courts original jurisdiction over class actions that are minimally diverse and have a total amount in controversy greater than \$5,000,000.⁵⁹ This general jurisdiction is subject to several exceptions. The entire class must number at least 100.⁶⁰ The primary defendants cannot be “States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.”⁶¹ CAFA’s “home state” exception requires courts to decline jurisdiction based on a detailed calculation of the citizenship of both plaintiffs and defendants.⁶² CAFA also contains a complicated “local controversy” exception that gives courts the right, but not the duty, to decline jurisdiction based on the citizenship of the parties and the nature of the action.⁶³ Among the factors that a court should consider are, whether the claims are of “national or interstate interest”; choice of law issues; whether a “nexus” exists among the plaintiffs, harm suffered, and the defendants; and whether similar class actions have been filed within the past three years asserting similar claims on behalf of “the same or other persons.”⁶⁴ Finally, CAFA does not apply to federal securities laws.⁶⁵

The Act also altered the removal jurisdiction and procedure for class actions. First, under CAFA, any defendant may remove, with or without the consent of other defendants.⁶⁶ Second, the Act changed the forum defendant rule for class actions, allowing in-state defendants to remove these cases.⁶⁷ Third, CAFA removed the one-year time limit on removal

actions filed in or removed to federal court had approximately doubled, according to the authors’ preliminary data).

58. See, e.g., Howard M. Erichson, *CAFA’s Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1593 (2008) (“CAFA, like every other major class action development of recent years, was born amidst snide remarks about lawyers’ inventing lawsuits and manipulating the system to enrich themselves at others’ expense.”).

59. 28 U.S.C. § 1332(d)(2) (2006). Minimal diversity requires only that any one plaintiff be diverse from any one defendant—the groups as a whole need not be completely diverse. See *id.* § 1332(d)(2)(A). Minimal diversity also exists if any party is a foreign state, or a citizen or subject of a foreign state, and any opposing party is a citizen of any State. *Id.* § 1332(d)(2)(B)–(C). Plaintiffs’ citizenship is determined for these purposes as of the date of filing; however, if federal jurisdiction did not exist at filing, citizenship will be determined as of the date of service of the papers that indicate the existence of this jurisdiction. *Id.* § 1332(d)(7).

60. *Id.* § 1332(d)(5)(B).

61. *Id.* § 1332(d)(5)(A).

62. See *id.* § 1332(d)(4).

63. See *id.* § 1332(d)(3). For a more detailed discussion of the “home state” and “local controversy” exceptions, see Burbank, *supra* note 19, at 1456–57.

64. See *id.* § 1332(d)(3).

65. See *id.* § 1332(d)(9).

66. *Id.* § 1453(b).

67. *Id.*; see also *id.* § 1441(b) (forum defendant rule).

for class actions.⁶⁸ Fourth, the Act also provided for discretionary appeals from orders deciding motions to remand.⁶⁹

In addition to its extension of federal jurisdiction over a broader range of class actions, CAFA formally recognized a specific set of nonclass aggregated actions that was also subject to this broader federal scope. This Note's next section turns to CAFA's treatment and definition of these "mass actions."

C. CAFA Mass Actions

1. Mass Actions: The Plain Language

In addition to redrafting the procedural rules that apply to traditional class actions, CAFA extended federal jurisdiction over "mass actions," which are considered class actions for the purpose of the statute.⁷⁰ CAFA defines a mass action as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact."⁷¹ To meet this statutory definition, a mass action must also satisfy the general threshold CAFA places on class actions.⁷² Thus, the total amount in controversy in aggregate must exceed \$5,000,000,⁷³ and minimal diversity must exist among the parties.⁷⁴ Confusingly, however, mass action jurisdiction only exists over plaintiffs who satisfy the standard amount in controversy requirement of \$75,000.⁷⁵ CAFA also explicitly precludes actions brought under Rule 23 or its state analogs from being defined as mass actions.⁷⁶

If a mass action meets these threshold requirements, jurisdiction may fail on any of the numerous exceptions to CAFA class actions⁷⁷ or the four specific exceptions applicable to mass actions.⁷⁸ First, a mass action cannot be removed to federal court if all of the claims brought "arise from an event or occurrence in the State in which the action was filed and that allegedly

68. *Id.* § 1453(b).

69. *Id.* § 1453(c).

70. *See Id.* § 1332(d)(11)(A). For other detailed discussions of the mass action provision, see Nicole Ochi, Note, *Are Consumer Class and Mass Actions Dead? Complex Litigation Strategies After CAFA & MMTJA*, 41 LOY. L.A. L. REV. 965, 995–1031 (2008) (describing the CAFA mass action and pleading strategies related to the statute's exceptions); S. Amy Spencer, Note, *Once More into the Breach, Dear Friends: The Case for Congressional Revision of the Mass Action Provisions in the Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 1067, 1071–82 (2006) (outlining and examining the mass action provision).

71. 28 U.S.C. § 1332(d)(11)(B)(i).

72. *See id.* § 1332(d)(11)(A).

73. *Id.* § 1332(d)(2), (6).

74. *Id.* § 1332(d)(2)(A).

75. *Id.* § 1332(d)(11)(B)(i); *see also id.* § 1332(a).

76. *See id.* § 1332(d)(11)(B)(i); *see also id.* § 1711(2).

77. *See id.* § 1332(d)(11)(A); *supra* notes 60–65 and accompanying text.

78. *See id.* § 1332(d)(11)(B)(ii).

resulted in injuries in that State” or contiguous States (the “event or occurrence” exception).⁷⁹ Second, claims “joined upon motion of a defendant” cannot be removed as mass actions.⁸⁰ Third, a mass action is exempt if all claims “are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action.”⁸¹ Finally, if “the claims have been consolidated or coordinated solely for pretrial proceedings,” a party cannot remove them as a mass action.⁸²

The mass action provision also limits the handling of an action once it has been successfully removed. Mass actions cannot be transferred to another court as a part of MDL postremoval unless a majority of plaintiffs request this transfer.⁸³ However, the action may be transferred under the MDL statute if the plaintiffs propose to certify the case pursuant to Rule 23 or if the case actually is certified as a class action.⁸⁴

Applying the plain language of this provision and its numerosity requirement has proved exceedingly complex. In order to understand the arguments examined in Part II, it is first necessary to understand the legislative history of CAFA and the mass action provision.

2. Mass Actions: The Legislative History

Just as CAFA’s authors urged courts to read the statute expansively as it applied to traditional class actions, they also stated their intent that the mass action device be broadly construed. Indeed, the Report’s authors explicitly grounded the need for the mass action device in the similarities between class and nonclass actions. As they succinctly put it, “mass actions are simply class actions in disguise.”⁸⁵ Because of this fact, the authors stated that mass actions are “subject to many of the same abuses” that they had excoriated in formal class actions.⁸⁶ The Report further claimed that mass actions potentially open the door to even worse abuses, allowing lawyers to join unrelated claims and “confuse a jury into awarding millions of dollars to individuals who have suffered no real injury.”⁸⁷

The broad intent underlying the mass action device especially reveals itself in the Report’s discussion of the exceptions to mass action jurisdiction. Simply put, the Report’s authors urged courts to read these statutory exceptions as narrowly as possible.⁸⁸ Most strikingly, the Senate

79. *Id.* § 1332(d)(11)(B)(ii)(I).

80. *See id.* § 1332(d)(11)(B)(ii)(II).

81. *Id.* § 1332(d)(11)(B)(ii)(III).

82. *Id.* § 1332(d)(11)(B)(ii)(IV).

83. *See id.* § 1332(d)(11)(C)(i); *see also id.* § 1407 (multidistrict litigation statute).

84. *Id.* § 1332(d)(11)(C)(ii).

85. S. REP. NO. 109-14, at 47 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 44.

86. *Id.* at 46, *reprinted in* 2005 U.S.C.C.A.N. at 43; *see also* 151 CONG. REC. H729 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

87. S. REP. NO. 109-14, at 47, *reprinted in* 2005 U.S.C.C.A.N. at 44.

88. *Id.* (“[I]t is the Committee’s intent that the exceptions to this provision be interpreted strictly by federal courts.”).

Report suggested that the “event or occurrence” exception should “apply only to a truly local *single* event with no substantial interstate effects.”⁸⁹ For guidance, the Report gives the example of “environmental torts such as a chemical spill”⁹⁰ that more closely resembles a “single sudden accident” than a broader interpretation of an “occurrence.”⁹¹ The Report would also have courts entirely preclude products liability cases from falling under this exception.⁹² By renaming the “event or occurrence” exception the “local” occurrence exception and by introducing language that does not appear in the statute, the Report attempted to define this exception as narrowly as possible.⁹³

While Congress’s intent for the broad application of CAFA and the mass action provision was clear, the statute’s language is anything but. Courts that have wrestled with applying the mass action language have had few kind words. As the U.S. Court of Appeals for the Eleventh Circuit put it, “CAFA’s mass action provisions present an opaque, baroque maze of

89. *Id.* (emphasis added).

90. *Id.*

91. This gloss on the statute’s language clashed with the views of Senator Chris Dodd, who noted that the “event or occurrence” exception was a compromise measure that would exempt a broader scope of cases from federal jurisdiction than those arising from a “single sudden accident.” See 151 CONG. REC. S1078 (daily ed. Feb. 8, 2005) (statement of Sen. Dodd).

92. S. REP. NO. 109-14, at 48, *reprinted in* 2005 U.S.C.C.A.N. at 45 (“[A] product liability case does not qualify for the ‘local’ occurrence exception in the provision.”); see also 151 CONG. REC. H732 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) (“[T]his exception would not apply to a product liability or insurance case.”). The Senate Judiciary Committee vigorously debated whether the mass action provision would extend federal jurisdiction over mass tort cases. Compare 151 CONG. REC. S1099–1100 (daily ed. Feb. 8, 2005) (statement of Sen. Durbin) (“These personal injury claims are usually based on State laws . . . I am afraid if [CAFA] becomes law, the so-called mass action provision will preempt all of these State procedures and take them out of State courts.”), with 151 CONG. REC. S1082 (daily ed. Feb. 8, 2005) (statement of Sen. Lott) (“Mass torts and mass actions are not the same. The phrase ‘mass torts’ refers to a situation in which many persons are injured by the same underlying cause, such as a single explosion, a series of events, or exposure to a particular product. In contrast, the phrase ‘mass action’ refers to a specific type of lawsuit in which a large number of plaintiffs seek to have all their claims adjudicated in one combined trial.”). In order to draw focus away from the statute’s potential impact on mass torts, Senator Lott emphasized its application in states such as Mississippi that do not have analogs to Rule 23. See 151 CONG. REC. S1082 (daily ed. Feb. 8, 2005) (statement of Sen. Lott). Senator Durbin seized on this example to argue that the mass action was intended to apply solely to states that lack a class action device. See 151 CONG. REC. S1236 (daily ed. Feb. 10, 2005) (statement of Sen. Durbin) (“And I understand from the statements made by Senator LOTT . . . that these so-called mass actions are currently filed only in Mississippi and West Virginia. In other words, this provision of [CAFA] will have no impact on mass torts cases filed in the other 48 States.”).

93. Compare S. REP. NO. 109-14, at 47, *reprinted in* 2005 U.S.C.C.A.N. at 44 (“The first exception would apply only to a truly local *single* event with no substantial interstate effects.” (emphasis added)), with 28 U.S.C. § 1332(d)(11)(B)(ii)(I) (2006) (“[A]ll of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State . . .”).

interlocking cross-references that defy easy interpretation”⁹⁴ Indeed, before courts had begun to examine this provision, commentators had already predicted that the mass action would be difficult to apply.⁹⁵ Even the number 100 is far less clear in application than the round figure would imply. The remainder of this part introduces the statutory ambiguities related to the mass action numerosity provision that have given rise to the litigation discussed in Part II.

Before analyzing the statute’s ambiguities, though, it is necessary to say a few words on how CAFA’s legislative history might be used to aid in statutory interpretation. As a general rule, a court’s analysis of a statute begins, and ideally ends, with its plain language.⁹⁶ Yet when confronted with an ambiguous statute, courts may choose to draw from the legislative history to aid their interpretation.⁹⁷ It should be noted, however, that the very use of these materials as a tool in statutory interpretation is a hotly debated subject.⁹⁸ Among these extrinsic aides to interpretation, committee reports “represent the most persuasive indicia of congressional intent in enacting a statute.”⁹⁹ Statements of legislators during debate are less

94. *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1198 (11th Cir. 2007) (citing *Abrego v. Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006)). The *Abrego v. Dow Chemical Co.* court declared CAFA’s language “clumsy” and “far from straightforward.” *Abrego v. Dow Chem. Co.*, 443 F.3d at 680–82; see also *Lowery v. Honeywell Int’l, Inc.*, 460 F. Supp. 2d 1288, 1293 (N.D. Ala. 2006) (calling the mass action provision a “Gordian knot”).

95. See GEORGENE M. VAIRO, CLASS ACTION FAIRNESS ACT OF 2005: WITH COMMENTARY AND ANALYSIS BY GEORGENE M. VAIRO OF THE MOORE’S FEDERAL PRACTICE BOARD OF EDITORS 37–38 (2005) (“[W]ith respect to mass actions, Congress has achieved nothing in terms of efficiency. Further, given the complexity of [the mass action provision], it will be interesting to note how fast and adept plaintiffs’ lawyers will become in pleading around these various provisions”); Spencer, *supra* note 70, at 1083–96.

96. See, e.g., *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (“[W]hen ‘the statute’s language is plain, ‘the sole function of the courts’—at least where the disposition required by the text is not absurd—‘is to enforce it according to its terms.’” (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989))).

97. See, e.g., *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 515–16 & n.8 (1992) (plurality opinion) (relying on the history of congressional amendments to analyze ambiguous language). But see, e.g., James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 222 (2006) (concluding that U.S. Supreme Court reliance on legislative history in cases on workplace law had declined dramatically from the Burger Court to the Rehnquist Court).

98. See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2150–51 (2002) (discussing the debate between strict textualists who reject the use of legislative history and others who consider it an invaluable tool). But cf. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (“[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.”).

99. 2A NORMAN J. SINGER & J. D. SHAMBLE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48:6, at 570–72 (7th ed. 2007). But see *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 617 (1991) (Scalia, J., concurring) (“[The] only mistake [is] failing to recognize how unreliable Committee Reports are—not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction. We use them when it is convenient, and ignore them when it is not.”).

reliable indicia of congressional intent, though ones that courts have sometimes used.¹⁰⁰ The postenactment views of legislators, by contrast, are of limited, or even no, use to statutory interpretation.¹⁰¹

This final point is of especial importance for CAFA. Courts have split in their reliance on CAFA's legislative history,¹⁰² primarily contained in a Report of the Senate Judiciary Committee,¹⁰³ as well as in debate in the Senate, and a short debate in the House of Representatives.¹⁰⁴ Most courts have limited their focus to the Senate Report, but many give the Report little weight or disregard it entirely.¹⁰⁵ The courts that take the latter approach have often based their choice on the assertion that the Report was not presented to the Senate until after CAFA's passage and enactment.¹⁰⁶

The true history of the Report, though, is just as opaque as CAFA's language. The Report is dated February 28, 2005—ten days after CAFA's enactment.¹⁰⁷ However, it seems that the Report was formally submitted to the Senate on February 3—during its consideration of the Act.¹⁰⁸ Those

100. Compare *Grove City Coll. v. Bell*, 465 U.S. 555, 565–71 (1984), *superseded by statute*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (using congressional debate and postenactment legislative history as persuasive indicia of congressional intent), with *Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs*, 506 U.S. 153, 166 (1993) (“[W]hen carefully read, we find the text of the statute unambiguous on the point at issue; accordingly, we give no weight to a single reference by a single Senator during floor debate in the Senate.”).

101. See 2A SINGER & SHAMBLE SINGER, *supra* note 99, § 48:20, at 628 (“Post-enactment views of those involved with the legislation should not be considered when interpreting the statute.”).

102. Compare *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1205–06 (11th Cir. 2007) (using the Senate Report to buttress its conclusions regarding CAFA's individual amount in controversy requirement), with *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) (rejecting reliance on the Senate Report, in large part because the court believed it was only considered after CAFA's passage).

103. S. REP. NO. 109-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3.

104. 151 CONG. REC. H723 (daily ed. Feb. 17, 2005). The House debated and voted on CAFA in less than four hours. Compare *id.* at H727 (debate starting at approximately 10:30 a.m.), with *id.* at H756 (vote on CAFA concluding shortly before 2 p.m.). President Bush also issued a signing statement on CAFA. Remarks on Signing the Class Action Fairness Act of 2005, 1 PUB. PAPERS 270 (Feb. 18, 2005); see also *supra* note 47.

105. See, e.g., *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 954 n.5 (9th Cir.) (“Dow relies heavily on a Senate Committee report that was not printed until ten days *after* CAFA's passage into law. . . . The Report is therefore of minimal, if any, value in discerning congressional intent, as it was not before the Senate at the time of CAFA's enactment.” (citations omitted)), *cert. denied*, 130 S. Ct. 187 (2009).

106. See, e.g., *Blockbuster*, 472 F.3d at 58.

107. Compare S. REP. NO. 109-14, *reprinted in* 2005 U.S.C.C.A.N. 3 (dated February 28, 2005), with Remarks on Signing the Class Action Fairness Act of 2005, 1 PUB. PAPERS 270 (Feb. 18, 2005).

108. See 151 CONG. REC. S978 (daily ed. Feb. 3, 2005) (noting that a committee report was introduced regarding “a bill to amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes”); see also *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1206 n.50 (11th Cir. 2007). CAFA passed the Senate on February 10, 2005, passed the House on February 17, and was signed by the President the following day. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 9, 119 Stat. 4, 14 & note (codified at 28 U.S.C. § 1332 note).

that have noticed this fact have insisted that the Senate Report should be given the full weight owed to formal legislative history.¹⁰⁹ But in his additional views contained in the Report, Senator Patrick Leahy decried that “[t]he circulation and filing of this report occurred after passage of the legislation for Senate consideration of the underlying bill. Indeed, it was filed after the House of Representatives passed this legislation.”¹¹⁰ Because of this failure, the Senator contended that the Report did not assist the Senate in its consideration of the bill.¹¹¹ To further cloud the picture, the House debate following the Senate’s passage of CAFA includes many passages taken verbatim from the Senate Report.¹¹² But these passages were added to the record following debate and could have been added after February 23.¹¹³ Given the disparity between Senator Leahy’s comments and the fact that a report was submitted to the Senate on February 3, there is no clear answer to the question of the Report’s timing.

3. Mass Actions: The Statutory Ambiguities

Although the legislative history’s own tangled backstory is intriguing, it would be of no more than academic interest if the statute were subject to an unambiguous reading. However, despite the clear number 100, the mass action’s numerosity requirement has revealed deep statutory ambiguities that have sent courts and litigators to the legislative history for guidance. CAFA’s supporters intended for the statute to be read broadly, but this general intent does not resolve specific issues raised by the application of the mass action’s numerosity requirement. Indeed, the disparity between Congress’s intent and CAFA’s language has opened the door to competing interpretations of the number 100 that this Note will discuss in Part II. The arguments advanced in those cases also draw on the recognition of the similarities between class and nonclass actions that both CAFA and its

109. See H. Hunter Twiford, III, et al., *CAFA’s New “Minimal Diversity” Standard for Interstate Class Actions Creates a Presumption That Jurisdiction Exists, with the Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 MISS. C. L. REV. 7, 52–67 (2005) (arguing, as the title hints, that CAFA creates a presumption in favor of finding diversity jurisdiction and places the burden of proof on the party opposing jurisdiction, in part because of clearly stated congressional intent).

110. S. REP. NO. 109-14, at 79, *reprinted in* 2005 U.S.C.C.A.N. at 73 (additional views of Sen. Patrick Leahy).

111. See *id.* (“Committee reports, like Committee consideration of measures, are intended to assist the Senate in its consideration of the matter. . . . In this case, that did not occur.”).

112. Compare, e.g., 151 CONG. REC. H729 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) (“The first exception would apply only to a truly local single event with no substantial interstate effects.”), with S. REP. NO. 109-14, at 47, *reprinted in* 2005 U.S.C.C.A.N. at 44 (identical language).

113. See 151 CONG. REC. H726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) (“[A]ll Members may have 5 legislative days within which to revise and extend their remarks and include extraneous material on S. 5.”); see also *id.* at H727 (statement of Rep. Sensenbrenner) (“We do not have the time in general debate for me to give this statement on the floor, so I will insert the statement relative to the intent of the managers of the bill in the RECORD at this point.”).

legislative history share. The remainder of this section highlights three phrases in the statute that, despite their deceptive simplicity, have ambiguous meanings: “claims of . . . persons,” “proposed to be tried jointly,” and the number 100 itself.

First, “claims of . . . persons” has proved deceptively difficult to define concretely. The statute does make clear that the claims must be for monetary relief, excluding purely injunctive suits.¹¹⁴ However, the statute is silent on the treatment of cases that involve claims for both types of relief, leaving courts to decide for themselves how to proceed.¹¹⁵ The more serious debates have centered on the identity of the owners of these claims—“persons.”¹¹⁶ The statute does not define “persons,” and in the Senate Report and debates in both houses, legislators spoke exclusively of “plaintiffs.”¹¹⁷ Further, in this same subsection, the statute refers to “plaintiffs whose claims in a mass action satisfy the jurisdictional”¹¹⁸ amount in controversy requirement, creating more confusion over that term’s absence from the earlier definition. In the context of aggregate litigation, it is difficult to develop a vocabulary that properly includes all of the types of parties and persons who have an interest in the proceedings.¹¹⁹ CAFA’s term exacerbates that difficulty. By using the amorphous “person” rather than a more precise word, CAFA opens at least the possibility that nonparties or nonclaimants could be counted towards the 100-person threshold.¹²⁰

The statute’s requirement that the claims of persons are “proposed to be tried jointly”¹²¹ is equally ambiguous. As to who must propose that the claims be tried jointly, the Senate Report specifies that it is the “plaintiffs who claim that their suits . . . should be tried together even though they do

114. See 28 U.S.C. § 1332(d)(11)(B)(i) (2006); see also *Kitazato v. Black Diamond Hospitality Invs., LLC*, No. 09-00271 DAE-LEK, 2009 WL 3824851, at *5 (D. Haw. Nov. 13, 2009) (“CAFA’s plain language mandated that Plaintiffs’ claims be for *monetary* relief.”).

115. See *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 430 (5th Cir. 2008) (allowing for injunctive and monetary claims to be treated separately).

116. See *infra* notes 281–92 and accompanying text.

117. See, e.g., 151 CONG. REC. H732 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) (“The Federal Court would have jurisdiction over the mass action because there are more than 100 plaintiffs”); 151 CONG. REC. S1082 (daily ed. Feb. 8, 2005) (statement of Sen. Lott) (“The mass action section was specifically included to prevent plaintiffs’ lawyers from making this end run.”); *id.* at S1097 (statement of Sen. Feingold) (“[The Act] simply requires that the plaintiffs be seeking damages of more than \$75,000 for the case to be considered a mass action”).

118. 28 U.S.C. § 1332(d)(11)(B)(i).

119. See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.01 cmt. c (Proposed Final Draft 2009) (discussing confusion that can arise from improperly labeling nonparties in aggregate proceedings).

120. See *infra* Part II.C; see also *Caldwell*, 536 F.3d at 424 & n.4 (discussing the Senate’s rejection of an amendment that would have exempted class actions filed by states’ attorneys general).

121. 28 U.S.C. § 1332(d)(11)(B)(i).

not seek class certification status.”¹²² The statute’s plain language excludes the defendants from making the proposal.¹²³ However, as the Senate debate revealed, it seems possible that a court could itself propose to try discrete claims jointly and create a CAFA mass action.¹²⁴ “Tried jointly” is also not an easily defined term. In the House debate, Representative Jim Sensenbrenner stated that this component would be satisfied by naming 100 or more plaintiffs in a complaint, “because there would be no other apparent reason to include all of those claimants in a single action unless the intent was to secure a joint trial of the claims asserted in the action.”¹²⁵ While it seems that mass formal joinder is sufficient to show an intent to be tried jointly, it is not clear that it is necessary.¹²⁶ Given the multiple ways of adjudicating and disposing of aggregate litigation, the claims of 100 or more persons can come into court without mass joinder.¹²⁷ Although the Senate Report explicitly encourages courts to look past the labels used by parties, it is unclear how the mass action device should tally claims not formally aggregated through the Federal Rules.

Even the number 100 is less concrete than it appears. The statute states that its “jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy” the \$75,000 jurisdictional minimum.¹²⁸ Because the mass action threshold is only \$5,000,000, there is a tension between these two requirements: if all 100 persons in a mass action were required to meet the individual threshold, the mass action would have a de facto amount in controversy requirement of \$7,500,000.¹²⁹ The statute specifies that the court does not have jurisdiction over individual plaintiffs who fail to satisfy the jurisdictional minimum, but it is silent over how the result of this separating sheep from goats should affect the court’s treatment of the mass

122. S. REP. NO. 109-14, at 46 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 43.

123. *See* 28 U.S.C. § 1332(d)(11)(B)(ii)(II).

124. This inference can be made based on the rejection of an amendment by Senator Durbin that would have exempted claims joined “by the court sua sponte” from mass action jurisdiction. *See* 151 CONG. REC. S1101 (daily ed. Feb. 8, 2005) (Amendment No. 3). The amendment also proposed to strike the word “solely” from the pretrial proceedings exemption, potentially eliminating mass action jurisdiction from all consolidated claims. *See* 151 CONG. REC. S1100-01 (daily ed. Feb. 8, 2005) (statement of Sen. Durbin). Two days after its introduction, Senator Durbin withdrew his proposed amendment. *See* 151 CONG. REC. S1236 (daily ed. Feb. 10, 2005) (statement of Sen. Durbin). Senator Durbin, in expressing his concern about the potential for courts to create mass actions sua sponte, particularly referenced state court proceedings against the Vioxx manufacturer Merck. *See* 151 CONG. REC. S1099-1100 (daily ed. Feb. 8, 2005) (statement of Sen. Durbin); *see also* Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2394 & nn.106-07 (2008) (describing Vioxx trials and settlement).

125. 151 CONG. REC. H729 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

126. *But cf.* Spencer, *supra* note 70, at 1080 (“[T]he most logical reading of ‘proposed to be tried jointly,’ leads to the conclusion that Congress meant only for claims joined willfully by the plaintiff under Rule 20(a) or a state equivalent to be treated as a class action subject to § 1332(d)(2)-(10).” (citations omitted)).

127. For example, the claims of 100 or more persons can come into court through intervention. *See* FED. R. CIV. P. 24.

128. 28 U.S.C. § 1332(d)(11)(B)(i).

129. *See id.* § 1332(d)(2).

in its entirety.¹³⁰ In these circumstances, the Senate Report urged that courts maintain jurisdiction over the mass, but remand individual plaintiffs who do not meet the \$75,000 threshold—even if the result is a mass action with fewer than 100 members.¹³¹ So long as the mass action as originally constituted met the jurisdiction requirements, “subsequent remands should not extinguish federal diversity jurisdiction[.]over the action.”¹³² In the House debate, Representative Sensenbrenner added that a court could maintain supplemental jurisdiction over the smaller claims.¹³³

This section has introduced ambiguities in the mass action statute that make the clarity of the number 100 illusory in practice. Interpreting these ambiguities depends on an understanding of both the fundamental similarities between class and nonclass aggregate litigation, as well as Congress’s broad intent in drafting CAFA and the mass action provision. Part II turns to three lines of cases that have drawn on these sources in order to apply the mass action numerosity requirement.

II. THREE WAYS TO COUNT TO 100: NUMEROSITY WITH MORE THAN 100 PARTIES, FEWER THAN 100 PARTIES, AND WITH A SINGLE PARTY

This part examines three types of mass action numerosity questions that courts have addressed. All of these cases display a tension in the courts’ analyses among a plain reading of the statute’s ambiguous language, consideration of CAFA’s broad legislative intent, and the similarities between class and nonclass aggregate litigation. The first line of cases presents a clear application of the statute—actions with more than 100 formally joined plaintiffs. Yet the plaintiffs in these cases have argued that the statute should not apply because their claims are not “proposed to be tried jointly.” Courts in these cases have unanimously found federal jurisdiction. In the second line of cases, more than 100 plaintiffs have split their claims into parallel actions, each with fewer than 100 formal parties. Defendants in these cases have argued that despite this structuring, courts should consider these separate actions as a single mass action—effectively, that plaintiffs in separate actions propose to try their claims jointly. All courts presented with these arguments have refused to aggregate separate actions into one mass action. In the third line of cases, defendants have argued that “claims of . . . persons” should include more than formal parties and extend to the “real parties in interest” to an action. Courts have split in

130. This silence may be due to the fact that this provision was the result of a legislative compromise. See 151 CONG. REC. S1078 (daily ed. Feb. 8, 2005) (statement of Sen. Dodd).

131. See S. REP. NO. 109-14, at 47 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 44; 151 CONG. REC. H729 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

132. S. REP. NO. 109-14, at 47, *reprinted in* 2005 U.S.C.C.A.N. at 44.

133. See 151 CONG. REC. H732 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) (“[The mass action] provision in no way is intended to abrogate [28 U.S.C. § 1367] to narrow current jurisdictional rules. Thus, if a Federal court believed it to be appropriate, the court could apply supplemental jurisdiction in the mass action context as well.”).

their reception to this argument. In sum, litigants have made the apparently simple task of applying the mass action's numerosity requirement decidedly difficult in practice.

A. Mass Actions with More than 100 Parties

A case for monetary relief with more than 100 joined plaintiffs would seem to easily qualify as a CAFA mass action. Yet even under these circumstances, the ambiguous statutory language has given attorneys—both plaintiffs' and defendants'—the opportunity to litigate the precise meaning of "proposed to be tried jointly."¹³⁴ Courts have universally found that joining more than 100 plaintiffs in a single complaint satisfies this intentionality requirement.

1. Bullard v. Burlington Northern Santa Fe Railway Co.

In 2007, Virda Bell Bullard, formally joined with 143 other plaintiffs, filed a tort claim in Illinois state court, seeking money damages arising from injuries caused by a wood treatment facility in Somerville, Texas.¹³⁵ Many of the plaintiffs, including Bullard herself, were simultaneously involved in parallel suits in Texas and other venues.¹³⁶ Defendants removed to federal court, asserting CAFA mass action jurisdiction, which prompted two motions from the plaintiffs—one to remand the case to state court and another asking for voluntary dismissal of fifty-three plaintiffs without prejudice.¹³⁷ The U.S. District Court for the Northern District of Illinois denied plaintiffs' motion to remand and rejected their contention that they had not proposed to try their claims jointly but had merely consolidated them for pretrial purposes.¹³⁸ By filing a single complaint for all 144 plaintiffs, the court held that the plaintiffs had opened the possibility of CAFA mass action removal.¹³⁹

The U.S. Court of Appeals for the Seventh Circuit affirmed the district court's reading of CAFA—the only sensible one according to the circuit court.¹⁴⁰ The Seventh Circuit agreed with the lower court's ruling that "one complaint implicitly proposes one trial" even if plaintiffs would be happy to resolve the case without coming before a jury.¹⁴¹ However, the Seventh

134. 28 U.S.C. § 1332(d)(11)(B)(i).

135. See *Bullard v. Burlington N. Santa Fe Ry. Co.*, No. 07 C 6883, 2008 WL 4104355, at *1 (N.D. Ill. Aug. 29, 2008).

136. See *id.* at *6, *9. Most of the plaintiffs apart from Virda Bell Bullard identified themselves as Texas citizens. See *id.* at *2.

137. See *Bullard v. Burlington N. Santa Fe Ry. Co.*, 556 F. Supp. 2d 858, 859 (N.D. Ill. 2008). The court reserved judgment on the motion to voluntarily dismiss. See *id.* at 860; see also *infra* notes 146–47.

138. See *Bullard*, 556 F. Supp. 2d at 859–60.

139. See *id.* at 860.

140. See *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 761 (7th Cir. 2008).

141. *Id.* at 762. Although not referenced by the court, this conclusion echoes that of CAFA's supporters in the House of Representatives. See *supra* note 125.

Circuit extended its reasoning in a lengthy dictum on how a court would actually try 100 or more plaintiffs. Chief Judge Frank H. Easterbrook began by noting the similarities between mass and class actions as they are handled by courts and litigators.¹⁴² The *Bullard* complaint lacked specificity as to individual plaintiffs, just as in class action pleadings.¹⁴³ The court presumed that in *Bullard*, like in a class action, only a few plaintiffs would be active, leaving the lawyers to run the case.¹⁴⁴ Having established the lack of real distinction between *Bullard* and a class action making similar allegations, the Chief Judge made a far broader suggestion:

The question is not whether 100 or more plaintiffs answer a roll call in court, but whether the “claims” advanced by 100 or more persons are proposed to be tried jointly. A trial of 10 exemplary plaintiffs, followed by application of issue or claim preclusion to 134 more plaintiffs without another trial, is one in which the claims of 100 or more persons are being tried jointly, and [CAFA] thus brings the suit within federal jurisdiction.¹⁴⁵

This dictum advances the reasoning based on similarities between class and nonclass actions far beyond the facts of *Bullard*. Taken on its face, the Chief Judge’s analysis suggests that mass actions could encompass even informally aggregated actions that utilized some form of bellwether trial.

After the Seventh Circuit’s ruling, the district court presiding over the case further concluded that the plaintiffs’ single complaint locked them into CAFA’s jurisdiction, even if they subsequently voluntarily dismissed enough plaintiffs for the action to fall below the numerosity threshold.¹⁴⁶ The district court considered the question of federal jurisdiction settled and, further, would allow voluntary dismissal only on the condition that they not later file similar claims in a manner designed to avoid CAFA jurisdiction.¹⁴⁷

Based on the Seventh Circuit’s reasoning and the uncited legislative history, *Bullard* is an easy case. But the court’s reasoning—in its broad dictum and its analogizing mass actions to class actions—hints at how courts could expand the reach of the mass action provision.

2. *Cooper v. R.J. Reynolds Tobacco Co.*

*Cooper v. R.J. Reynolds Tobacco Co.*¹⁴⁸ is a mirror image of *Bullard*. But just as plaintiffs in *Bullard* could not evade CAFA by

142. See *Bullard*, 535 F.3d at 761.

143. See *id.* (“[Plaintiffs’] complaint alleges that several questions of law and fact are common to all 144 plaintiffs; it provides no more information about each individual plaintiff than an avowed class complaint would do.”).

144. *Id.* (“[A]s a practical matter counsel will dominate, just as in a class action.”).

145. *Id.* at 762.

146. See *Bullard v. Burlington N. Santa Fe Ry. Co.*, No. 07 C 6883, 2008 WL 4104355, at *7–10 (N.D. Ill. Aug. 29, 2008).

147. See *id.* at *8, *10.

148. 586 F. Supp. 2d 1312 (M.D. Fla. 2008).

shedding plaintiffs postremoval, the *Cooper* court held that a defendant does not squander federal jurisdiction by artful trial strategy. *Cooper* involved the claims of approximately 3400 individuals who had previously been parties to a 700,000-member class action before it was decertified by the Florida Supreme Court.¹⁴⁹ Rather than bringing their claims individually, the *Cooper* plaintiffs filed mass actions, each involving approximately 200 parties.¹⁵⁰ The U.S. District Court for the Middle District of Florida found that none of the mass action exceptions applied to these actions but that a numerosity question remained.¹⁵¹

The defendant cigarette companies announced that, although they had removed the case as a single CAFA mass action, they intended to argue that each plaintiff's claim should be severed and tried individually.¹⁵² If they succeeded, the trial court would be left with a CAFA mass action involving the claims of more than 100 plaintiffs but proceeding to more than 100 unique trials.¹⁵³ Despite this potentially bizarre result, the court held that removal was proper.¹⁵⁴

Beginning with the statutory text, the court essentially concluded that defendants' postremoval intent was irrelevant, given that the plaintiffs originally proposed to try their claims jointly.¹⁵⁵ Were it to evaluate subject matter jurisdiction continually, as the plaintiffs requested, later severance would fail to give effect to the statute's intent-related language.¹⁵⁶ Underlying this conclusion was the court's holding that CAFA did not change the "general rule that postremoval events do not deprive federal courts of subject-matter jurisdiction."¹⁵⁷ The court analogized this strategy to the potential postremoval remand of parties who collectively constitute a mass action but do not meet the individual amount in controversy requirement of more than \$75,000.¹⁵⁸ Under these circumstances, the court

149. See *id.* at 1314 (citing *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006)).

150. See *id.*

151. See *id.* at 1315–18. This result would also turn the “pretrial proceedings” exception to mass action jurisdiction on its head. See 28 U.S.C. § 1332(d)(11)(B)(ii) (2006).

152. *Cooper*, 586 F. Supp. 2d at 1318.

153. See *id.* at 1320; see also 28 U.S.C. § 1332(d)(11)(B)(ii)(IV).

154. See *Cooper*, 586 F. Supp. 2d at 1322–23.

155. See *id.* at 1319–20.

156. See *id.* at 1320.

157. *Id.* at 1319 (quoting *Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2417 n.1 (2007)). The court also cited several cases in which federal courts retained CAFA jurisdiction over cases after class certification had been denied. See *id.*

158. See *id.* at 1320. In two important CAFA cases, the U.S. Courts of Appeals for the Ninth and Eleventh Circuits both addressed this question, raised by the dual amount in controversy requirements for individual and mass action jurisdiction. See *Lowery v. Ala. Power Co.*, 483 F.3d 1184 (11th Cir. 2007); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006). The Ninth Circuit noted the possibility that the remand of individual plaintiffs who do not meet the \$75,000 jurisdictional minimum could result in a mass action with fewer than 100 parties; however, the court avoided resolving this issue, finding that the defendants had not shown that any of the plaintiffs satisfied this requirement. See *id.* at 686–90. The *Lowery v. Alabama Power Co.* court concluded that the statute's plain language, as well as congressional intent, dictated that a court retain federal jurisdiction in such a case,

concluded, it would retain jurisdiction of the case, even if the number of plaintiffs remaining in federal court was less than 100.¹⁵⁹

The court also consulted CAFA's "relatively thin" legislative history for guidance.¹⁶⁰ Although the final statutory language is the neutral "proposed to be tried jointly,"¹⁶¹ the court seized on two passages from the Senate Report that suggested Congress meant for the plaintiffs' intent to be dispositive.¹⁶² The Report defines mass actions as suits brought by at least 100 "plaintiffs who claim that their suits . . . should be tried together"¹⁶³ or as "any civil action in which 100 or more named parties seek to try their claims for monetary relief together."¹⁶⁴ The Report's language—"plaintiffs who claim," "parties [who] seek"—seemed to the court to envisage an inquiry into the plaintiffs' intent, rather than a detached, objective assessment of whether 100 or more parties will be tried jointly.

The court concluded its analysis by drawing on the broader purpose giving rise to CAFA.¹⁶⁵ The Senate Report had stated that "mass actions are simply class actions in disguise."¹⁶⁶ *Cooper* presented a clearer example than some—all the plaintiffs had previously been members of the putative class in a large, decertified class action.¹⁶⁷ The court found that the plaintiffs' trial strategy—bringing claims in groups of 200 rather than individually—created the class action in disguise warned of in the Senate Report.¹⁶⁸ Under other circumstances, the defendants' remove-and-sever strategy "although procedurally defensible, could be viewed as a misuse of CAFA jurisdiction."¹⁶⁹ However, in light of the choice to bring their claims in groups of 200 rather than individually, "plaintiffs' litigation strategy has invited defendants' CAFA removal. That defendants removed to this Court with the strategic intent to seek severance of plaintiffs' claims has no effect on this Court's subject matter jurisdiction."¹⁷⁰

But even the *Cooper* court was not overjoyed with its result. In its opinion, these cases would do nothing but add a tremendous burden to the

but also mooted this conclusion because the defendant did not show that the \$5,000,000 amount in controversy requirement was satisfied. *See Lowery*, 483 F.3d at 1205–07, 1218–21. For a detailed summary of this lengthy case, see Georgene M. Vairo, *CAFA Mass Action Primer*, NAT'L L.J., Sept. 10, 2007, at 13.

159. *See Cooper*, 586 F. Supp. 2d at 1315 n.1 (citing *Lowery*, 483 F.3d at 1204–07). *But see Lowery*, 483 F.3d at 1207 ("We need only decide what the \$75,000 provision *does not* do—namely, supplant the Act's plainly expressed \$5,000,000 aggregate requirement by requiring a per-plaintiff minimum threshold requirement that ultimately requires a showing of claims worth \$7,500,000 in the aggregate.").

160. *Cooper*, 586 F. Supp. 2d at 1321.

161. 28 U.S.C. § 1332(d)(1)(B)(i) (2006).

162. *See Cooper*, 586 F. Supp. 2d at 1321.

163. S. REP. NO. 109-14, at 46 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 43.

164. *Id.*, *reprinted in* 2005 U.S.C.C.A.N. at 44.

165. *See Cooper*, 586 F. Supp. 2d at 1322.

166. *Id.* (quoting S. REP. NO. 109-14, at 47, *reprinted in* 2005 U.S.C.C.A.N. at 44).

167. *See id.*

168. *See id.*

169. *Id.*

170. *Id.*

dockets of federal courts and, argued normatively, properly belonged in Florida state courts. Although the court professed that CAFA had ineluctably compelled its result, it made clear that this conclusion “should not imply that the Court believes it *should have* jurisdiction” over these cases.¹⁷¹

The courts in *Bullard* and *Cooper* each believed their cases to be relatively simple. Yet they also reveal the ambiguities brought out by even the most straightforward application of the CAFA mass action numerosity requirement. The courts’ reasoning also demonstrates the permeability of any distinction between class and nonclass litigation—a fact that the courts leverage in their decisions. In *Bullard* and *Cooper*, there is little tension between a strict reading of the statute’s numerosity requirement and the realities of aggregate litigation. The following sections, however, will examine cases where a strict reading of the numerosity requirement does not easily mesh with the nature of nonclass aggregation.

B. Mass Actions with Fewer than 100 Parties

CAFA enunciated a hard numerosity threshold in its mass action definition. This bright line, however, practically begs a creative lawyer to structure complaints in order to evade CAFA’s scope by including fewer than 100 plaintiffs in any one suit. Indeed, barely a year after CAFA’s passage, some plaintiffs’ lawyers had predicted that this tactic would essentially neuter the mass action device.¹⁷² The Ninth Circuit grappled with precisely this structuring in *Tanoh*. The Ninth Circuit took a strict textual approach to this question, ignoring the defendants’ invitation to look past the plaintiffs’ artful pleading, and rejected the existence of a mass action.

1. *Tanoh v. Dow Chemical Co.*

In *Tanoh v. Dow Chemical Co.*,¹⁷³ 664 West African fruit plantation workers filed state law tort claims against Dow and other companies for injuries allegedly caused by pesticide use.¹⁷⁴ Rather than bringing these

171. *Id.*

172. See David A. P. Brower, *The 2003 Amendments to Rule 23 of the Federal Rules of Civil Procedure and the Class Action Fairness Act of 2005*, in 2 CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS 1467, 1488 n.20 (ALI-ABA Course of Study Materials No. SL081, May 31–June 1, 2006) (“Since plaintiffs can avoid this provision simply by joining only 99 plaintiffs, it is unlikely to have great impact in practice.”).

173. 561 F.3d 945 (9th Cir.), *cert. denied*, 130 S. Ct. 187 (2009).

174. *Id.* at 950–51. The pesticide 1,2-dibromo-3-chloropropane (DBCP) was used to control nematodes that infest plant roots. *Id.* at 951 n.1. In 1979, the EPA banned domestic use of DBCP, but permitted its continuing export. *Id.* The plaintiffs alleged that Dow continued to supply DBCP to plantations in the Ivory Coast until 1986. *Id.* The continued use of DBCP abroad has spawned a host of lawsuits filed in Florida, Louisiana, Hawaii, and California, and one jury verdict for \$3.3 million. Robert C. Cook, *Pesticides: U.S. Supreme Court Declines To Scrutinize Lawsuits Filed by West African Fruit Workers*, Chem. Reg.

claims in a single action, the plaintiffs filed seven separate suits in California state court—each containing fewer than 100 plaintiffs.¹⁷⁵ Simultaneously, these workers filed a parallel action in federal court asserting claims under the Alien Tort Statute.¹⁷⁶ In all of these actions, the plaintiffs were represented by the same counsel.¹⁷⁷ On November 10, 2009, subsequent to the cases discussed in this section, the Superior Court in Los Angeles County, California, dismissed *Tanoh* amidst allegations of ethical improprieties by the plaintiffs' lawyers.¹⁷⁸

After the filing of the multiple actions in state court, the defendants removed *Tanoh*, arguing both that the plaintiffs had fraudulently joined nondiverse defendants and that the actions considered as a whole constituted a CAFA mass action. The U.S. District Court for the Central District of California rejected these arguments and ordered remand.¹⁷⁹ The court first ruled that the forum defendants had been properly joined, citing the heavy burden facing defendants arguing fraudulent joinder and the courts' general presumption against finding removal jurisdiction.¹⁸⁰

The court briefly addressed the defendants' CAFA argument. The defendants argued that the plaintiffs had strategically structured their state

Daily (BNA) D10 (Oct. 6, 2009), available at 10/6/2009 CHRD d10 (Westlaw). The plaintiffs' exposure to DBCP allegedly caused sterility and infertility. *Tanoh*, 561 F.3d at 950–51.

175. *Tanoh*, 561 F.3d at 951.

176. 28 U.S.C. § 1350 (2006); see *Abagninin v. Amvac Chem. Corp.*, 545 F.3d 733, 735 & n.2 (9th Cir. 2008). The district court hearing these claims accepted the transfer of the removed state tort actions for handling. See *Tanoh v. Amvac Chem. Corp. (Amvac)*, Nos. CV 06-7038 PA (JTLx), CV 06-7059 PA (JTLx), CV 06-7067 PA (JTLx), CV 06-7043 PA (JTLx), CV 06-7060 PA (JTLx), CV 06-7058 PA (JTLx), CV 06-7061 PA (JTLx), 2008 WL 4691004, at *1 (C.D. Cal Oct. 21, 2008). In 2008, the Ninth Circuit affirmed the dismissal of the plaintiffs' federal claims. See *Abagninin*, 545 F.3d at 737–43.

177. See David Bario, *Gibson Dunn Knocks Out African Pesticide Cases for Dole*, THE AMLAW LITIG. DAILY, Nov. 19, 2009, <http://www.law.com/jsp/tal/digestTAL.jsp?id=1202435667127&hbxlogin=1> (subscription required, on file with the Fordham Law Review).

178. See *id.* *Tanoh v. Dow Chemical Co.* was dismissed amidst allegations, uncovered and made by defense counsel, that the plaintiffs' firm, the Metzger Law Group, had "illegally collected semen samples from Ivorian peasants and otherwise skirted the law." *Id.* Metzger disputed these charges but later withdrew from the case because of ethical concerns that the firm's lawyers "had become potential witnesses to an alleged fraud." *Id.* Following Metzger's removal from the cases, the plaintiffs failed to make an appearance and the judge dismissed their complaints. See *id.* Courts have dismissed claims in other DBCP cases following similar allegations of lawyer misconduct. See generally David Hechler, *The Kill Step*, AM. LAW., Oct. 2009, at 154.

179. *Amvac*, 2008 WL 4691004, at *5–6. In an earlier decision, the district court had ordered remand sua sponte based on its conclusion that the nondiverse defendants were properly joined. See *Ayemou v. Amvac Chem. Corp.*, 312 F. App'x 24, 30–31 (9th Cir. 2008). The Ninth Circuit reversed based on its holding that the district court could not examine the validity of the party joinder and invoke the forum defendant rule sua sponte. See *id.*

180. See *Amvac*, 2008 WL 4691004, at *3–5. The court also rejected the defendants' argument that the plaintiffs' motion to remand was procedurally defective. See *id.* at *2.

complaints simply to avoid federal jurisdiction.¹⁸¹ The district court declined the invitation to treat the separate claims as a single mass action.¹⁸² To support its decision, the court pointed both to the absence of precedent that would support the defendants' informal consolidation of plaintiffs' claims, as well as the general presumption against finding removal jurisdiction.¹⁸³ Moreover, the court held that Congress had specifically foreclosed such a consideration by excluding cases "joined upon motion of a defendant" from the mass action definition.¹⁸⁴ If the court took this action that the defendants themselves were forbidden to take, it "would effect an end-run around the limits Congress itself has imposed on removal pursuant to CAFA."¹⁸⁵

On appeal, the Ninth Circuit solely addressed the CAFA numerosity argument, and it too refused to treat the seven separate actions as a single mass action.¹⁸⁶ The court first scrutinized the statute's language and intent. The Ninth Circuit cited section two of CAFA, outlining the Act's purposes, to conclude that it was "designed primarily to curb perceived abuses of the class action device which, in the view of CAFA's proponents, had often been used to litigate multi-state or even national class actions in state courts."¹⁸⁷ The court, though, was not forced to rely on CAFA's intent because, "[b]y its plain terms, [CAFA] does not apply to plaintiffs' claims in this case, as none of the seven state court actions involves the claims of one hundred or more plaintiffs, and neither the parties nor the trial court has proposed consolidating the actions for trial."¹⁸⁸ Thus, the court did not need to engage in a more searching examination of the plaintiffs' complaints because applying the plain language of the statute would not be "absurd, but rather . . . consistent with both the well-established rule that plaintiffs, as masters of their complaint, may choose their forum by selecting state over federal court and with the equally well-established presumption against federal removal jurisdiction."¹⁸⁹ Essentially, the court

181. *Id.* at *5. The plaintiffs filed "one action involving 668 plaintiffs in federal court and several separate actions involving the same plaintiffs, but in groups less than 100, in state court." *Id.*

182. *See id.* ("Defendants cite no authority holding that plaintiffs may not file multiple actions, each with fewer than 100 plaintiffs, to work within the confines of CAFA to keep their state-law claims in state court and the Court declines to do so.")

183. *See id.* (citing *Hofler v. Aetna US Healthcare of Cal., Inc.*, 296 F.3d 764, 767 (9th Cir. 2002)).

184. *Id.* (citing 28 U.S.C. § 1332(d)(11)(B)(ii)(II) (2006)).

185. *Id.* (citing *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 998–99 (9th Cir. 2007)).

186. *See Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 956 (9th Cir.), *cert. denied*, 130 S. Ct. 187 (2009).

187. *Id.* at 952 (citing Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 5).

188. *Id.* at 953.

189. *Id.* (citing *Lowdermilk*, 479 F.3d at 998–99). For the proposition of statutory interpretation that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its

concluded that *Tanoh* was an easy case, explicitly governed by the plain language of the statute and requiring no great leaps of analysis to reach the proper result.

The court further rejected the defendants' contention that the plaintiffs were attempting to evade CAFA jurisdiction by artificially structuring their suits, thus subverting the congressional intent underlying the Act.¹⁹⁰ The Ninth Circuit first reiterated the conclusion of the district court that acting on the defendants' suggestion to treat the actions as a single mass action would itself violate CAFA because the court construed the defendants' suggestion as an informal motion.¹⁹¹ The court drew additional support from the "pretrial proceedings" exception to the CAFA mass action.¹⁹² This provision indicates that "Congress intended to limit the numerosity component of mass actions quite severely by including only actions in which the trial itself would address the claims of at least one hundred plaintiffs."¹⁹³ The *Tanoh* court's reading of the statutory language thus allowed little leeway for the defendants' interpretive suggestions.

Turning away from the statutory text, the court did not believe the pleadings strategies of *Tanoh* were among the catalog of horrors warned of by the Senate Report. In the class action context, the court agreed with the defendants that CAFA was intended to curtail duplicative and overlapping cases filed and adjudicated in multiple jurisdictions.¹⁹⁴ But this was not the situation before the court:

Dow fails to explain how such concerns apply to this case, in which seven *different* groups of plaintiffs, none of which purport to represent a nationwide class, allege the same injuries in the *same* court. . . . [S]uch concerns simply do not apply in this case, in which plaintiffs expressly elected *not* to proceed as a class.¹⁹⁵

Moreover, the court noted in an aside that the Senate Report was of little, if any, value in analyzing CAFA since it was not printed until ten days after CAFA's passage.¹⁹⁶ Ultimately, the Ninth Circuit simply did not see *Tanoh* as a case of copycat litigation—as warned against by the statute.¹⁹⁷ The court concluded that this duplicative litigation, rather than cases engineered

terms," the court quoted *Hartford Underwriters Insurance Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000). See *Tanoh*, 561 F.3d at 953.

190. See *Tanoh*, 561 F.3d at 953.

191. See *id.* at 953–54 ("The absence of a formal motion cannot blink away the fact that . . . the defendant[] is asking us to consolidate separate actions for purposes of applying the 'mass action' provision. A 'motion' is nothing more than 'a written or oral application requesting a court to make a specified ruling or order,' BLACK'S LAW DICTIONARY 1036 (8th ed. 2004), so Dow's request precisely fits the statutory limitation.").

192. See *id.* at 954 (citing 28 U.S.C. § 1332(d)(11)(B)(ii)(IV) (2006)).

193. *Id.*

194. See *id.*

195. *Id.*

196. See *id.* at 954 n.5.

197. See *id.* at 954–55.

by the number of parties, was the gamesmanship CAFA aimed to strike against.¹⁹⁸

Finally, Dow directed the court's attention to three out-of-circuit cases that, it argued, militated against remand.¹⁹⁹ In each of these cases, courts found that federal jurisdiction existed despite the plaintiffs' machinations specifically intended to avoid CAFA's reach. *Tanoh* distinguished all three.

The *Tanoh* defendants first pointed to *Proffitt v. Abbott Laboratories*,²⁰⁰ a case involving eleven putative class actions alleging conspiracy and anticompetitive practices intended to hold on to a monopoly on the market of fenofibrate drugs.²⁰¹ Each lawsuit was identical in substance but covered a separate time period.²⁰² By breaking up the complaint into these distinct periods, each individual action fell below CAFA's amount in controversy threshold.²⁰³ The *Proffitt* court asserted that the time divisions were arbitrary and merely a "deliberate attempt" to circumvent the CAFA.²⁰⁴ The court relied on the Senate Report and stated that CAFA should be read as a significant expansion of preexisting federal jurisdiction over class actions.²⁰⁵ Courts, it reasoned, should aggressively police plaintiffs who gerrymander their complaints to avoid CAFA's reach.²⁰⁶ The court held that the eleven lawsuits before it were duplicative and arbitrary, and thus would be treated as a single suit to determine the amount in controversy.²⁰⁷ The court also argued that, even if it treated the suits separately at this stage, "[u]ndoubtedly, at some point they would be consolidated for trial and treated as one lawsuit for the purposes of judicial economy."²⁰⁸

198. *See id.*

199. *See id.* at 955–56.

200. No. 2:08-CV-151, 2008 WL 4401367 (E.D. Tenn. Sept. 23, 2008); *see Tanoh*, 561 F.3d at 955–56.

201. *See Proffitt*, 2008 WL 4401367, at *1.

202. *See id.* at *2. The court also noted that similar actions were pending in Delaware federal court and that some plaintiffs were involved in both cases. *See id.* at *1.

203. *See id.* at *2; *see also* 28 U.S.C. § 1332(d)(2) (2006).

204. *Proffitt*, 2008 WL 4401367, at *2 ("The time divisions are completely arbitrary and have no justifiable basis other than as a means to create time frames small enough to allow the damages disclaimers as they are not warranted by the facts of the alleged conspiracy.").

205. *See id.* at *5 ("The intent of Congress was clear that the new § 1332(d) would substantially broaden federal court jurisdiction over class actions.").

206. *See id.* at *4–5 (citing *Shappell v. PPL Corp.*, No. 06-2078 (AET), 2007 WL 893910, at *3 (D.N.J. Mar. 21, 2007)). The court in *Shappell v. PPL Corp.* allowed plaintiffs to voluntarily dismiss a claim removed under CAFA on the "condition that none of the Plaintiffs named within the complaint may file or enter a class action in any court in the United States on the basis of any theory of recovery stemming from the facts stated in the complaint before this Court." *Shappell*, 2007 WL 893910, at *3.

207. *See Proffitt*, 2008 WL 4401367, at *5.

208. *Id.* Arguably, if these class actions were consolidated for trial in state court, defendants could remove under the mass action provision, arguing that the classes were made up of more than 100 people whose claims would be adjudicated at a single trial. *See* 28 U.S.C. § 1332(d)(11)(B)(i).

The *Tanoh* defendants also cited *Freeman v. Blue Ridge Paper Products, Inc.*,²⁰⁹ which examined another group of class actions split up by time period to fall below CAFA's amount in controversy requirement.²¹⁰ Indeed, the plaintiffs admitted that avoiding federal jurisdiction was the "only reason for this structuring"²¹¹ and agreed that this strategic gambit would prevent them from recovering anything above the "overall limit [demanded] for each time period."²¹² Although state law appeared to allow such claim splitting,²¹³ the U.S. Court of Appeals for the Sixth Circuit held that removal was appropriate: the plaintiffs had offered "no colorable reason for breaking up the lawsuits in this fashion, other than to avoid federal jurisdiction."²¹⁴ The court cited the Senate Report and Congress's general intent to prevent gamesmanship and to create "efficiencies in the judicial system by allowing overlapping and 'copycat' cases to be consolidated in a single federal court."²¹⁵ The court also relied on *Proffitt* and dismissed the plaintiffs' attempt to distinguish that case on the basis that nuisance cases were more susceptible to splintering than conspiracy claims.²¹⁶ Simply stated, the Sixth Circuit believed that allowing this type of artful pleading would eviscerate CAFA as Congress intended for it to be applied, so long as the plaintiffs could base their pleading strategy on a footing allowed under state law.²¹⁷ In these circumstances, plaintiffs had used this pleading device to expand on their total recovery, and, because they splintered these suits "for no colorable reason, the total of such identical splintered lawsuits may be aggregated."²¹⁸ The dissenting judge zeroed in on the court's "no colorable reason" standard and highlighted the court's failure to cite authority for this criterion, "especially where . . . the filing of multiple actions is legal under state law."²¹⁹

The *Tanoh* court distinguished these cases for two reasons. First, in each, considered in aggregate, the same class of plaintiffs was demanding more than \$5,000,000.²²⁰ In *Tanoh*, by contrast, each group of plaintiffs was separate, meaning that no single group would collect more than the

209. 551 F.3d 405 (6th Cir. 2008); see *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 955–56 (9th Cir.), *cert. denied*, 130 S. Ct. 187 (2009).

210. See *Freeman*, 551 F.3d at 407–09. In aggregate, the total amount in controversy was \$24.5 million. *Id.* at 409.

211. *Id.* at 407.

212. *Id.* at 409.

213. See *id.* at 408–09 & n.1 (applying North Carolina law).

214. *Id.* at 407.

215. *Id.* at 408 (quoting S. REP. NO. 109-14, at 5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 6).

216. See *id.* at 408–09.

217. *Id.* at 407 ("If such pure structuring permits class plaintiffs to avoid CAFA, then Congress's obvious purpose in passing the statute—to allow defendants to defend large interstate class actions in federal court—can be avoided almost at will, as long as state law permits suits to be broken up on some basis.").

218. *Id.* at 409.

219. *Id.* at 411 (Daughtrey, J., dissenting).

220. See *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 955 (9th Cir.), *cert. denied*, 130 S. Ct. 187 (2009).

jurisdictional threshold.²²¹ Second, neither *Freeman* nor *Proffitt* addressed CAFA's mass action provision, and in neither case was the numerosity requirement in dispute.²²² The court declined to read the cases more broadly and quoted language from *Freeman* that professed to limit its decision to claims splintered by time period.²²³

The *Tanoh* court also summarily distinguished *Bullard*, the third case cited by the defendants.²²⁴ Although Dow argued that the Seventh Circuit's reasoning dictated treating all the claims in *Tanoh* as a single mass action, the court limited *Bullard*'s application to claims involving more than 100 plaintiffs.²²⁵

Like the *Bullard* and *Cooper* courts, the Ninth Circuit applied a strict reading of the statutory language to rebuff the defendants' request that parallel cases be treated as one mass action. Unlike the cases discussed in Part II.A, however, *Tanoh* supported its conclusion in part by highlighting differences between class and mass actions. The court read the statute and the legislative history not as conflating the two procedural devices but as drawing distinctions between the two that the court was bound to respect.

2. *Brown v. Bayer Corp.* and *Mobley v. Cerro Flow Products, Inc.*

Shortly before this Note's publication, *Tanoh*'s holding was echoed in two opinions issued by Judge George Patrick Murphy of the U.S. District Court for the Southern District of Illinois where defendants removed on the same theory the Ninth Circuit rejected. In *Brown v. Bayer Corp.*,²²⁶ five plaintiffs brought claims in state court, alleging injuries stemming from the use of the prescription medication Trasylol.²²⁷ The defendant removed, arguing that the plaintiffs could be considered parties to other actions before the district court, which, together, would constitute a mass action with 171 plaintiffs.²²⁸ The district court called this argument "ridiculous" and based its rejection on the plain language of the statute.²²⁹ First, the district court echoed *Tanoh* and reasoned that the mass action provision only reached cases with 100 or more parties in the caption.²³⁰ Second, the court repeated

221. *See id.* ("The concerns animating *Freeman* and *Proffitt* simply are not present in this case [since] each of the seven state court actions was brought on behalf of a *different* set of plaintiffs, meaning that none of the plaintiff groups stands to recover in excess of CAFA's \$5 million threshold between the seven suits.").

222. *See id.*

223. *See id.* at 956 (quoting *Freeman*, 551 F.3d at 409).

224. *See id.* at 956 n.6; *see also supra* Part II.A.1 (discussing *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759 (7th Cir. 2008)).

225. *See Tanoh*, 561 F.3d at 956 n.6.

226. No. 09-989-GPM, 2010 WL 148629 (Jan. 13, 2010).

227. *See id.* at *1.

228. *See id.* at *1-2.

229. *Id.* at *2.

230. *See id.* at *3 ("The statute provides for federal subject matter jurisdiction only as to suits in which one hundred or more persons have joined their claims; cases involving the claims of fewer than one hundred persons simply are not within the purview of the statute.").

Tanoh's conclusion that acceding to the defendant's request to aggregate these cases would trigger CAFA's exception for claims "joined upon motion of a defendant."²³¹ The court also noted that although these cases had been coordinated for proceedings in state court, that fact only made the case look more like the exception against cases consolidated "solely for pretrial proceedings."²³²

Beyond a plain reading of the statute, the district court also held that more traditional principles of removal jurisdiction prevented it from retaining the case in federal court. To aggregate the claims as the defendant desired would conflict with the tenets that a plaintiff is the master of his complaint and that he must make a voluntary act to trigger removal jurisdiction.²³³ The district court also noted that it could not consolidate a case over which it had not already acquired subject matter jurisdiction.²³⁴ The court's reasoning, though, boiled down to a plain reading of the statute: "as the statute now stands the removing Defendants' theory of CAFA jurisdiction based on aggregation of the claims in this case . . . must be rejected."²³⁵

In the earlier case decided by Judge Murphy, *Mobley v. Cerro Flow Products, Inc.*,²³⁶ the court reached the same conclusion, also based on a strict reading of the statute. In *Mobley*, thirty-two plaintiffs alleged injuries caused by the negligent release of toxic chemicals and brought suit in Illinois state court.²³⁷ The defendants removed, arguing, as in *Tanoh* and *Brown*, that *Mobley* should be consolidated with four other "identical" actions pending in federal court.²³⁸ Judge Murphy rejected this argument. On the question of numerosity, the court first concluded that the claims in *Mobley* could only be consolidated with other cases upon a motion of the defendants, especially "given that Plaintiffs' complaint in this case expressly disclaim[s] any desire for consolidation of the claims in this case with related claims."²³⁹ The judge also addressed the suggestion that he could consolidate these cases sua sponte but concluded, without elaborating on his reasoning, that "the Court sees no likelihood of sua sponte consolidation here and, even if such consolidation were to occur, it likely would be solely for pretrial purposes, which would not bring the consolidated claims within the scope of the CAFA."²⁴⁰ The court

231. See *id.* (quoting 28 U.S.C. § 1332(d)(11)(B)(ii)(II) (2006)).

232. See *id.* ("[A]ny coordination of proceedings in the state court (or, for that matter, in federal court) actually defeats CAFA jurisdiction in this instance.").

233. See *id.*

234. See *id.*

235. *Id.* The court also held that the plaintiffs had not fraudulently joined a plaintiff who was a citizen of Pennsylvania, where Bayer maintained its principal place of business. See *id.* at *3–7.

236. No. 09-697-GPM, 2010 WL 55906 (S.D. Ill. Jan. 5, 2010).

237. See *id.* at *1–2.

238. See *id.*

239. *Id.* at *3.

240. *Id.* (citing 28 U.S.C. § 1332(d)(11)(B)(ii)(IV) (2006)). In a footnote, the court further concluded that the traditional rules of governing removal jurisdiction also eliminated

concluded its discussion of the mass action provision by citing *Tanoh*, and held that the plain language of the statute precluded the defendant's tactic.²⁴¹

The cases discussed in this part have addressed how courts read "proposed to be tried jointly" when asked to aggregate parties in formally separate actions to create a single mass action. These courts have chosen to read the mass action statute strictly, though perhaps at the expense of giving life to Congress's broad intent. The next section turns to courts examining the phrase "claims of . . . persons," which presents additional difficulties of interpretation.

C. Mass Actions with One Party

Bullard and *Cooper* presented relatively straightforward mass action problems, and the engineered complaints of *Tanoh* were an inevitable result of CAFA's inclusion of a bright-line numerosity threshold. In the following cases, however, defendants have pressed an argument that could dramatically expand the scope of the CAFA mass action. Creative defense lawyers have asked courts to look past the face of the pleadings to find the true parties in interest to a case. By including these unnamed claimants, these defendants argue that courts can find mass actions even where only a single plaintiff appears in the caption. In the first case discussed, the Fifth Circuit accepted this argument and equated the case's "true parties in interest" with CAFA's "claims of . . . persons." Courts that have decided similar arguments have universally not found federal jurisdiction, though not all have rejected the Fifth Circuit's analysis of this question.

1. *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*

In *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*,²⁴² the Fifth Circuit accepted the defendant's invitation to look past the labels used by the plaintiff in its pleadings and found a hidden mass action, despite the fact that the action involved only a single plaintiff. The dispute at issue in *Caldwell* concerned an alleged conspiracy among several insurance companies, the consulting firm McKinsey & Company, and an information management company to illegally undervalue and underpay the claims of Louisiana policyholders.²⁴³ Louisiana's Attorney General, aided by four

the possibility of CAFA jurisdiction: that the plaintiff is the master of his complaint, that a court can only consolidate cases properly before it, and that removal jurisdiction is construed narrowly. *See id.* at *3 n.2; *see also supra* notes 233–35 and accompanying text. The court also held that CAFA's "event or occurrence" exception foreclosed federal jurisdiction. *See Mobley*, 2010 WL 55906, at *3 ("[I]t is undisputed that Plaintiffs in this case are suing in Illinois on claims that arose in Illinois.").

241. *See Mobley*, 2010 WL 55906, at *3 (citing *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 952–56 (9th Cir.), *cert. denied*, 130 S. Ct. 187 (2009)).

242. 536 F.3d 418 (5th Cir. 2008).

243. *See id.* at 421–23.

private plaintiffs' law firms,²⁴⁴ brought a *parens patriae* action in state court seeking injunctive relief, forfeiture of illegal profits, and treble damages on behalf of policyholders.²⁴⁵ Simultaneously, the plaintiffs' firms were pursuing "nearly identical claims" in purported class actions filed in federal court.²⁴⁶ The defendants removed, asking the U.S. District Court for the Eastern District of Louisiana to look past the labels applied by the Attorney General and recognize the suit as one satisfying CAFA's jurisdictional requirements: "although labeled *parens patriae*, this case is in substance and fact a 'class action' or a 'mass action' as those terms are used in CAFA"²⁴⁷ The defendants' primary argument was that this case was a class action masquerading as a *parens patriae* suit, not that behind the plaintiff's labels lay a mass action.²⁴⁸ The defendants highlighted the parallel class action proceedings in federal court to buttress its assertion.²⁴⁹

The district court agreed with the defendants, concluding that it could not take the plaintiff's pleadings at face value, but instead must "look at the substance of . . . the complaint."²⁵⁰ The State, according to the court, was merely a nominal party and the true parties in interest were more than 100 Louisiana policyholders, giving the court jurisdiction under CAFA.²⁵¹

Before the Fifth Circuit could determine whether the case was in fact a mass action, it had to pierce the complaint and look behind the single named plaintiff who brought the suit.²⁵² The court cited the "well-established" rule that "federal courts look to the substance of the action and not only at the labels that the parties may attach" in order to determine whether jurisdiction exists.²⁵³ When appropriate, the court concluded, "defendants may pierce the pleadings to show that the . . . claim has been fraudulently pleaded to prevent removal."²⁵⁴ Notably, the cases the court cites are not entirely on point.²⁵⁵ The first case it cites, *Grassi v. Ciba-Geigy, Ltd.*,²⁵⁶ specifically addresses the assignment of claims with the intent of destroying diversity jurisdiction, but *Caldwell* uses *Grassi* to

244. *See id.* at 421 & n.2.

245. *See id.* at 423.

246. *See id.*

247. *Id.* (emphasis added).

248. *See id.* at 435 (Southwick, J., dissenting) ("[E]ven if this suit should be a class action (as the Defendants argue) or a mass action (as the majority concludes), there is no jurisdiction until the suit has indeed been brought under a Rule 23 equivalent or as a mass action in state court.").

249. *See id.* at 423.

250. *Id.* (internal quotation marks omitted).

251. *See id.*

252. *See id.* at 424–25.

253. *Id.* at 424 (citing *Grassi v. Ciba-Geigy, Ltd.*, 894 F.2d 181, 185 (5th Cir. 1990)).

254. *Id.* at 424–25 (quoting *Burchett v. Cargill, Inc.*, 48 F.3d 173, 175 (5th Cir. 1995)).

255. *See* Georgene Vairo, *CAFA and AG Suits*, NAT'L L.J., Nov. 24, 2008, at 25 ("While it is true that there are occasions when courts 'pierce the pleadings' to determine whether a party is improperly seeking to create or destroy jurisdiction, the cases the 5th Circuit relied on do not support it.").

256. 894 F.2d 181.

support a broader license to read past the face of the complaint.²⁵⁷ The second, *Wecker v. National Enameling & Stamping Co.*,²⁵⁸ dealt with the question of fraudulent joinder of defendants.²⁵⁹ The final case the court relied on, *Burchett v. Cargill, Inc.*,²⁶⁰ was equally narrow and limited its inquiry to fraudulent pleading of the Jones Act,²⁶¹ which cannot be removed from state court.²⁶² The court in *Burchett* limited its analysis to the Jones Act and analogized it to fraudulent joinder of defendants.²⁶³ The Fifth Circuit mooted its own analysis, however, because the State had waived its right to contest this issue by failing to raise any objection to the district court's decision to pierce the complaint.²⁶⁴

The Fifth Circuit then turned to the question of *parens patriae* actions and reviewed their purposes and limits. At the heart of both, the court stated, is the State's sovereignty.²⁶⁵ The inherent powers of the sovereign give the State authority to bring suit.²⁶⁶ Because of the source of its authority, the State's standing is limited to cases "asserting an interest that relates to its sovereignty."²⁶⁷ One class of issue that would not provide *parens patriae* standing is "private interests pursued by the state, where the state is only acting as a nominal party."²⁶⁸ But a state may pursue a *parens patriae* action to "vindicate a 'quasi-sovereign interest,'"²⁶⁹ a difficult-to-define term that turns on whether the alleged injury affects a "sufficiently substantial segment of [the State's] population."²⁷⁰ If the State's action asserted a quasi-sovereign interest, then it would be the real party in interest.²⁷¹

257. Compare *Grassi*, 894 F.2d at 185 ("We accordingly hold that federal district courts have both the authority and the responsibility, under 28 U.S.C. §§ 1332 and 1441, to examine the motives underlying a partial assignment which destroys diversity and to disregard the assignment in determining jurisdiction if it be found to have been made principally to defeat removal."), with *Caldwell*, 536 F.3d at 424 ("It is well-established that in determining whether there is jurisdiction, federal courts look to the substance of the action and not only at the labels that the parties may attach."). On assignment intended to destroy diversity jurisdiction, see generally 13F CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 3641 (3d ed. 2009).

258. 204 U.S. 176 (1907).

259. See *id.* at 185. See generally 13F WRIGHT ET AL., *supra* note 257, § 3641.1.

260. 48 F.3d 173 (5th Cir. 1995).

261. Merchant Marine Act of 1920 (Jones Act), Pub. L. No. 66-261, § 33, 41 Stat. 988, 1007 (codified as amended at 46 U.S.C. § 30104 (2006)). The Jones Act allows for personal injury actions by seamen. See *id.*

262. See 28 U.S.C. § 1445(a); *Burchett*, 48 F.3d at 175.

263. See *Burchett*, 48 F.3d at 175-76.

264. See *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 425 (5th Cir. 2008) (citing *Chambers v. Mukasey*, 520 F.3d 445, 448 n.1 (5th Cir. 2008)).

265. See *id.* at 425-27.

266. See *id.* at 425.

267. *Id.* (citing *Alfred L. Snapp & Son, Inc. v. P.R. ex rel. Barez*, 458 U.S. 592, 600-01 (1982)).

268. *Id.* at 426 (citing *Snapp*, 458 U.S. at 601-02).

269. *Id.* (quoting *Snapp*, 458 U.S. at 601).

270. *Id.* (quoting *Snapp*, 458 U.S. at 607).

271. See *id.* at 428-30.

The conflict in *Caldwell* centered upon the State's demand for treble damages.²⁷² As a threshold matter, the parties contested whether the Attorney General had any authority to demand treble damages under Louisiana's Monopoly Act or whether this right was limited to injured parties.²⁷³ However, the court simply assumed that the State had this authority, stating that the issue of authority to bring suit was not relevant to the question of who was the true party in interest.²⁷⁴ Because "individuals have the right to enforce this provision . . . the policyholders, and not the State, are the real parties in interest [on the claim for treble damages]."²⁷⁵ While the State could sue for treble damages where it itself is the policyholder,²⁷⁶ in this case, Louisiana sought to "recover damages suffered by individual policyholders."²⁷⁷ The State's own pleadings revealed this fact, according to the court, with its numerous references to "insureds" and "policyholders."²⁷⁸ The purpose of treble damages—to incentivize individual suits—also bolstered the court's reasoning.²⁷⁹ Thus, the court concluded that the State was merely a cipher in its request for treble damages: the true parties in interest were the individual, injured policyholders who were not formally parties to the suit.²⁸⁰

The Fifth Circuit did its analytical heavy lifting to conclude that Louisiana policyholders—not the Attorney General—were the true parties in interest to the suit. In the remainder of its opinion, it breezed through the

272. See *id.* Many courts in similar cases have chosen not to examine claims individually but instead look at the complaint as a whole to determine who the real party in interest is. See, e.g., *Illinois v. SDS West Corp.*, 640 F. Supp. 2d 1047, 1051–52 (C.D. Ill. 2009); *Wisconsin v. Abbott Labs.*, 341 F. Supp. 2d 1057, 1062–63 (W.D. Wis. 2004). But see *Connecticut v. Levi Strauss & Co.*, 471 F. Supp. 363, 370–71 (D. Conn. 1979) (determining citizenship separately by relief requested). None of these courts styles its inquiry as "piercing the complaint," but they do scrutinize its "essential nature and effect." *SDS West*, 640 F. Supp. 2d at 1050 (quoting *Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 250 (7th Cir. 1981)).

273. See *Caldwell*, 536 F.3d at 429–30. Louisiana's Monopoly Act is codified at LA. REV. STAT. ANN. §§ 51:121–:152 (2003). The Act authorizes "[a]ny person" injured by a violation to request treble damages. See *id.* § 51:137. The State has general authority to bring claims under the act. See *id.* § 51:138 ("All suits for the enforcement of this Part shall be instituted . . . by the Attorney General, on his own motion or by direction of the governor, or by the district attorney, acting under instruction of the governor or Attorney General . . .").

274. See *Caldwell*, 536 F.3d at 429–30.

275. *Id.* at 429 (citing *Louisiana ex rel. Guste v. Fedders Corp.*, 524 F. Supp. 522, 557 (M.D. La. 1981)).

276. See *id.* at 429 n.8.

277. *Id.* at 429.

278. See *id.* at 429 n.9 ("[T]he petition is rife with statements that make clear that the policyholders are the real parties in interest in this action.").

279. See *id.* at 430.

280. See *id.* The fact that the policyholders were the true parties in interest also effected a waiver of the State's Eleventh Amendment sovereign immunity. See *id.* at 430–32 (citing *Louisiana v. AAA Ins. (In re Katrina Canal Litig. Breaches)*, 524 F.3d 700, 711 (5th Cir. 2008)); see also U.S. CONST. amend. XI. *Louisiana v. AAA Ins. (In re Katrina Canal Litigation Breaches)* was a putative class action with the State and numerous Louisiana citizens the plaintiffs. See *In re Katrina Canal Litig. Breaches*, 524 F.3d at 702.

application of this holding to CAFA's jurisdictional rules.²⁸¹ But rather than relying on the statute's test, the court primarily drew on the Act's legislative history. The Fifth Circuit particularly highlighted the Senate Report's instruction that "the term 'class action' . . . be defined broadly to prevent 'jurisdictional gamesmanship.'"²⁸² The court further noted that the Senate had considered and rejected an amendment that would have exempted class actions filed by attorneys general from CAFA's scope.²⁸³ Without much ado, the court summarily concluded that CAFA applied to the case before it.

Having determined that the policyholders are real parties in interest, we agree that . . . this is a civil action involving the monetary claims of 100 or more persons that is proposed to be tried jointly on the ground that the claims involve common questions of law or fact . . . and it is being brought in a representative capacity on behalf of those who allegedly suffered harm.²⁸⁴

The court's analysis here depends on its unstated equating of "real party in interest"²⁸⁵ with "claims of . . . persons."²⁸⁶ The real party in interest is the party that "possesses the right sought to be enforced."²⁸⁷ In this case, the "persons" possessing the claims are not the parties actively asserting them. Under the circumstances, the absent persons could be nonparty claimants, but this status also involves the active assertion of claims.²⁸⁸

281. See *Caldwell*, 536 F.3d at 430.

282. *Id.* at 424 (quoting S. REP. NO. 109-14, at 35 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 34). The court also cited Congress's intent that CAFA as a whole be interpreted liberally. See *id.* (quoting S. REP. NO. 109-14, at 35, reprinted in 2005 U.S.C.C.A.N. at 34); see also *supra* note 56 and accompanying text.

283. See *id.* at 424 & n.4. The amendment, proposed by Senator Mark Pryor, would have exempted "any civil action brought by, or on behalf of, any attorney general." 151 CONG. REC. S1157 (daily ed. Feb. 9, 2005) (statement of Sen. Pryor). Senator Pryor was particularly concerned that CAFA could sweep *parens patriae* actions that are brought in the form of class actions into federal court. See *id.* at S1159 (statement of Sen. Pryor). CAFA's supporters argued that the Act would not affect the rights of attorneys general to bring suits, and also highlighted the dangers of private plaintiffs' attorneys pressing these types of suits on behalf of states. See, e.g., *id.* at S1163 (statement of Sen. Grassley) ("Plaintiffs' lawyers could simply ask State attorneys general to lend their name to a class action lawsuit so as to keep them in the State court."). The amendment's opponents also noted fundamental differences between *parens patriae* suits and class actions. See *id.* (statement of Sen. Hatch) ("But let me be perfectly clear that they are not class actions."). The amendment was voted down sixty to thirty-nine. See *id.* at S1165 (roll call vote).

284. *Caldwell*, 536 F.3d at 430 (citing 28 U.S.C. § 1332(d)(11)(B)(i) (2006)).

285. Cf. FED. R. CIV. P. 17(a).

286. 28 U.S.C. § 1332(d)(11)(B)(i).

287. CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 70, at 492-93 (6th ed. 2002). Wright and Kane note that courts often confuse the concept of real party in interest with the question of standing in the context of government action. See *id.* § 70, at 492 n.2.

288. The *Principles of the Law of Aggregate Litigation* implicitly support this assumption in their definition of nonparty claimants as "persons asserting . . . claims," that is, as persons actively asserting their rights, although not necessarily within the confines of formal litigation. See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.01(c)-(d) & cmts. c-e (Proposed Final Draft 2009).

The court did not acknowledge or support this assumption, and the terms do not necessarily overlap in full.²⁸⁹ Moreover, the Senate Report does not discuss, or even mention, real parties in interest.²⁹⁰ Nor did this concept arise during debate in the House or Senate.²⁹¹ Interestingly, “real party in interest” was mentioned in the legislative history of previous versions of CAFA, but only with respect to class actions.²⁹² In sum, the connection between “real party in interest” and the mass action is not immediately plain.

Because the case came before the Fifth Circuit with only a single party, the court noted that its ruling would require the district court to add individual policyholders to make the action a mass action.²⁹³ The court abstained from considering how this was to be accomplished—a task best left to the “capable hands” of the district judge.²⁹⁴ The circuit court also left open the possibility that the State could sever its claims and ask that its request for injunctive relief be remanded to state court.²⁹⁵

In dissent, Judge Leslie Southwick rejected the court’s construction of a mass action without a mass. The court, in the dissent’s eyes, did not have any subject matter jurisdiction over the case, and thus its inquiry should have ended before it attempted to transform the suit into something it was not.²⁹⁶ Louisiana had not brought the case as a formal class action and in its present state it was not yet a mass action.²⁹⁷ Even if the dissent went along with the court’s conclusion that the State was merely a nominal plaintiff, that would merely present a “defective pleading under Louisiana law.”²⁹⁸ Transforming the suit into a mass action improperly forced the Attorney General to proceed in a posture he did not elect, challenging the presumption that the plaintiff is the master of his own complaint.²⁹⁹

289. See *Caldwell*, 536 F.3d at 430. On the confusion raised by the term “persons,” see *supra* notes 114–20 and accompanying text.

290. See S. REP. NO. 109-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3.

291. This assertion is based on a search of the congressional record, as assembled in *Arnold and Porter Class Action Fairness Act of 2005*, available on Westlaw.

292. See, e.g., H.R. REP. NO. 108-144, at 42 (2003) (“When a class action is filed, however, only the named plaintiffs and their counsel have control over the choice of forum; the vast majority of the real parties in interest—the unnamed class members on whose behalf the action is brought and the defendants have no voice in that decision.”).

293. See *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 430 (5th Cir. 2008).

294. See *id.* (“We leave to the district judge’s capable hands the manner by which the individual policyholders are to be added to this action. Once again, we need not extend our appellate hands into matters that the district court is well-able to address.”).

295. See *id.*

296. See *id.* at 432–35 (Southwick, J., dissenting).

297. See *id.* at 433.

298. *Id.* at 434.

299. See *id.* at 433–34 (“But even when looking underneath the pleadings to discern the true nature of the suit, we begin with the proposition that the plaintiff is the master of his complaint; all contested issues of fact and ‘any ambiguity or uncertainty in the controlling state law’ must be resolved against the party who seeks removal based upon a claim that the plaintiff has disguised a federal case.” (quoting *Rico v. Flores*, 481 F.3d 234, 238–39 (5th Cir. 2007))).

Moreover, the dissenter believed federal court was the wrong forum in which to tease out the complexities of Louisiana's Monopoly Act and the Attorney General's ability to seek treble damages.³⁰⁰ For these reasons, Judge Southwick would have remanded the case and let the state courts determine the proper way to proceed.³⁰¹

The *Caldwell* court's decision pointedly does not examine the statutory language in depth, and relies primarily on the license granted by the Senate Report. It also seems to depend on an equivalence between class and nonclass cases, allowing it to force the creation of a mass action from a case with only a single plaintiff. Although its mode of analysis is starkly different from that of the courts discussed in Parts II.A and II.B, the court is fundamentally dealing with a similar problem—rationalizing the realities of aggregate litigation with an ambiguous statute. The cases examined in the next section take up this same question but with divergent results.

2. After *Caldwell*: Adoption and Dissent

Most courts that have responded to similar arguments as those in *Caldwell* have rejected the call to pierce the complaint and manufacture a CAFA mass action. This section examines three such cases. None of these cases reaches the same result as *Caldwell*. Two courts have rejected *Caldwell*'s analysis outright, even expressed alarm at its connotations, but one has shown itself willing to expand the idea of the mass action.

In *Kitazato v. Black Diamond Hospitality Investments, LLC*,³⁰² despite the fact that the court reached the opposite result from that in *Caldwell*, the U.S. District Court for the District of Hawaii accepted at least the premise of the Fifth Circuit's holding. *Kitazato* concerned three individuals and the Society to Protect Diamond Hawaii who jointly brought a number of claims in state court against a resort and related parties. None of these claims were for money damages.³⁰³ The defendants removed based on the argument that the Society was a representative plaintiff and that the true plaintiffs in the action numbered more than 100—in short, that this was another mass action in disguise.³⁰⁴ A magistrate judge recommended remand, first, because CAFA mass actions and the Ninth Circuit under *Tanoh* do not allow representative plaintiffs; second, because even if that were not the law of the circuit, defendants could not show that more than 100 persons brought the suit; and, third, because CAFA mass actions must be claims for monetary relief.³⁰⁵

300. *See id.* at 435–36 (“The state court’s ruling on that motion and any interlocutory appeals that might be permitted would be dispositive on the issues before us and would not be *Erie* guesswork.”).

301. *See id.* at 436.

302. No. 09-00271 DAE-LEK, 2009 WL 3824851 (D. Haw. Nov. 13, 2009).

303. *See id.* at *4–5.

304. *See id.* at *3–4.

305. *See id.* at *1–3.

The district court agreed with this final conclusion.³⁰⁶ Although the relief sought by the plaintiffs could result in cost to the defendants, “[b]y its plain language, CAFA limits mass actions to suits seeking monetary relief and does not extend to actions seeking solely equitable or declaratory relief.”³⁰⁷ Although the court could have remanded on this ground—and also suggested that the case may fall under the mass action “event or occurrence” exception³⁰⁸—the court also examined the case under the numerosity requirement.

With only four named plaintiffs, the removing defendants zeroed in on the Society to Protect Diamond Hawaii and argued that it was a representative plaintiff; taking this into account, more than 100 persons were bringing claims.³⁰⁹ Both the magistrate judge and the district court disagreed and held that “a mass action does not allow for a plaintiff’s representation of other persons in a manner identical to that of a class action.”³¹⁰ But class representation was not an issue presented to the court, it averred, because the plaintiffs had not pleaded their claims as a formal class action.³¹¹ Instead, the court reasoned that the constitution of the Society itself provided an exception to this general prohibition because “an association may sue in a representative capacity on behalf of its members if it meets certain standing requirements.”³¹²

The Supreme Court has recognized that an association has standing to assert claims on behalf of its members if

- (a) its members would otherwise have standing to sue in their own right;
- (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.³¹³

Federal courts had interpreted this third requirement as constitutionally prohibiting associations from seeking monetary relief on behalf of their members because such claims would require the participation of individual members.³¹⁴ However, the Supreme Court held subsequent to *Hunt* that “the third prong of the associational standing test is best seen as focusing on

306. *See id.* at *4–6.

307. *Id.* at *5.

308. *See id.* at *6; *see also* 28 U.S.C. § 1332(d)(11)(B)(ii)(I) (2006); *supra* notes 79, 89–93 and accompanying text.

309. *See Kitazato*, 2009 WL 3824851, at *3–4. The defendants argued that the Society represented approximately 490 individual parties. *See Kitazato v. Black Diamond Hospitality Invs., LLC*, No. 09-00271 DAE-LEK, 2009 WL 3209298, at *6 (D. Haw. Oct. 6, 2009) (findings and recommendation of magistrate judge).

310. *Kitazato*, 2009 WL 3824851, at *3.

311. *See id.*

312. *See id.* (citing *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 342–43 (1977)). In adopting this line of reasoning, the court disregarded the recommendation of the magistrate judge. *See Kitazato*, 2009 WL 3209298, at *6 (findings and recommendation of magistrate judge).

313. *Hunt*, 432 U.S. at 343.

314. *See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553–54 (1996).

these matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution.”³¹⁵ The Court’s prime concern was that representative suits result in properly adversarial actions.³¹⁶ Thus, administrative standing does retain many features common to a representative plaintiff.

The *Kitazato* district court reasoned that the Society’s ability to assert representative claims aligned this case with *Caldwell*, which the court cited as “instructive, although not binding authority.”³¹⁷ The Court reasoned that the Society acted as a proxy in place of its membership and that those constituent members were the “real parties in interest” in the suit.³¹⁸ Although the court adopted the Fifth Circuit’s reasoning from *Caldwell*, it did not reach the same conclusion; even including the Society’s members, the 100 person threshold was still not reached.³¹⁹

The court in *Kitazato* did not use the Fifth Circuit’s *Caldwell* ruling in order to keep this case in federal court, but it did adopt the Circuit’s reasoning, agreeing that a court must look behind the names in the caption to determine the true nature of the action.³²⁰ The district court also adopted *Caldwell*’s conflation of real party in interest with claims proposed to be tried jointly. The court’s reasoning is especially interesting because the case came down in the wake of *Tanoh*—binding precedent for that court.³²¹ While *Tanoh* established a seemingly strict rule—to focus solely on the case caption and ignore any subjective arguments that might warrant piercing the complaint—the *Kitazato* court did not feel constrained to consider the parties in interest merely facially. The district court’s *sub silentio* acceptance of *Caldwell*’s analysis demonstrates that courts may be willing to unmoor the mass action from its strict foundations.

Other courts asked to equate “claims of . . . persons” with real parties in interest have declined to follow the trail blazed by *Caldwell*. In *California Public Employees Retirement System v. Moody’s Corp. (CalPERS)*,³²² the U.S. District Court for the Northern District of California fully agreed with the *Kitazato* magistrate judge’s earlier report and recommendation and

315. *Id.* at 557. In this case, the Court determined that the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101–2109 (2006), authorized a Union to seek monetary damages representationally on behalf of its members. *See United Food*, 517 U.S. at 558.

316. *See United Food*, 517 U.S. at 558 (“If these provisions for representative actions were generally resulting in nonadversarial actions that failed to resolve the claims of the individuals ultimately interested, their disservice to the core Article III requirements would be no secret.”).

317. *Kitazato*, 2009 WL 3824851, at *3.

318. *See id.* at *4.

319. *See id.* (stating that the court could count “no more than 52 persons with an interest in the underlying litigation in the instant case”).

320. *See id.*

321. *See id.* at *3 (citing *Tanoh v. Dow Chem. Co.*, 561 F.3d 945 (9th Cir.), *cert. denied*, 130 S. Ct. 187 (2009)).

322. Nos. C 09-03628 SI, C 09-03629 JCS, 2009 WL 3809816 (N.D. Cal. Nov. 10, 2009).

limited “claims of . . . persons” to formal parties.³²³ The plaintiff in *CalPERS* was California’s government retirement administrator that was suing a credit rating agency for negligently giving their highest grade to three Structured Investment Vehicles.³²⁴ The retirement fund’s beneficiaries numbered more than 1.6 million.³²⁵ The court summarily found that CalPERS itself, not any of its beneficiaries, was the sole plaintiff, and thus the case could not, by definition, be deemed a mass action.³²⁶ The court entirely disagreed with the reasoning behind *Caldwell*, which it did not cite, in its reading of the mass action provision and its legislative history:

[T]he Senate Committee Report for CAFA defines “mass actions” as “suits that are brought on behalf of numerous *named plaintiffs* who claim that their suits present common questions of law or fact that should be tried together even though they do not seek class certification status.” This action does not fall within this definition because it does not concern numerous named plaintiffs who are electing to try their claims together.³²⁷

CalPERS demonstrates both the unwillingness of this court to accept *Caldwell*’s reasoning and the fact that CAFA’s legislative history does not ineluctably lead to an expansion of the mass action in the eyes of all judges.

In a third case, the U.S. District Court for the Southern District of New York rejected the most sweeping attempt to expand *Caldwell*’s approach to mass actions. *Anwar v. Fairfield Greenwich Ltd.*³²⁸ involved several cases filed in state court in the wake of the collapse of Bernie Madoff’s infamous Ponzi scheme.³²⁹ The claims at issue in *Anwar* concerned the Fairfield Greenwich Group, an umbrella corporation that managed, maintained, and advised a range of investment funds.³³⁰ Several of these funds directed billions of dollars to Bernard Madoff, collecting investment management fees over the years but losing everything once the scheme was revealed. *Anwar* consolidated four cases—three derivative suits brought on behalf of funds managed within the Fairfield Greenwich Group and one direct suit—each of which, the defendants claimed, was a CAFA mass action.³³¹ Although the derivative claims were brought by, at most, two individual partners or shareholders, the defendants argued that, like in *Caldwell*, the

323. *See id.* at *6–7.

324. *See id.* at *1.

325. *See id.*

326. *See id.* at *7.

327. *See id.* (quoting S. REP. NO. 109-14, at 46 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 43)).

328. Nos. 09 Civ. 0118, 09 Civ. 2366 (Ferber), 09 Civ. 2588 (Pierce), 09 Civ. 5012 (Morning Mist), 09 Civ. 5650 (Sentry), 2009 WL 5103234 (S.D.N.Y. Dec. 23, 2009). This decision adopted in full a report and recommendation of a magistrate judge as its ruling. *See id.* at *2.

329. *See Anwar*, 2009 WL 5103234, at *4.

330. *See id.*

331. *See id.* at *1, *5.

court should count the “beneficial equity holders,” rather than the named plaintiffs, and find a CAFA mass action.³³²

The court declined this invitation. Even assuming that each fund had at least 100 beneficial equity holders, the judge found no support in CAFA’s language or legislative history for the defendants’ arguments.³³³ First, the court read CAFA’s plain language as entirely unsupportive of the defendants’ claims.³³⁴ The court also read CAFA’s legislative history as strictly limiting mass actions to traditional mass joinder claims and, even more specifically, to states without an analog to Rule 23 class actions.³³⁵ Although the magistrate judge could not rely on them, the district court noted that *Kitazato* and *CalPERS* buttressed these conclusions.³³⁶ Moreover, plaintiffs’ derivative suits were neither examples of artful pleading nor of a “class action in disguise”³³⁷ and thus were entitled to the traditional deference plaintiffs receive as masters of their complaint.³³⁸ Ironically, the court used *Caldwell* to support remand, rather than CAFA jurisdiction: “[h]ere, as in *Caldwell*, the state statutes giving a shareholder or limited partner authority to bring a derivative action designate the corporate entity as the ‘real party in interest.’”³³⁹ If the Fifth Circuit in *Caldwell* pierced the complaint to find more than 100 parties, the district court here found only a single entity, the corporation, behind the named plaintiffs.³⁴⁰

332. *Id.* at *7. The magistrate judge had earlier allowed limited discovery to determine whether the 100-party threshold was satisfied for some of the plaintiffs. *See Anwar v. Fairfield Greenwich Ltd.*, No. 09 Civ. 0118(VM)(THK), 2009 WL 1181278, at *2–4 (S.D.N.Y. May 1, 2009). In doing so, the magistrate judge rejected *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1215–18 (11th Cir. 2007), which disallowed limited discovery to determine jurisdiction.

333. *See Anwar*, 2009 WL 5103234, at *8 (“In order to adopt the expansive reading of CAFA proposed by Defendants, the Court must be persuaded, at the very least, that there is some language in the statute, legislative history, or relevant case law that supports such an interpretation. Indeed, there is none.”).

334. *See id.*

335. *See id.* at *10. In reaching this conclusion, the court relied on the Senate debate and stated, “CAFA’s legislative history makes clear that Congress envisioned ‘mass actions’ as claims by multiple plaintiffs ‘consolidated by State court rules,’ but not otherwise pled as class actions. More specifically, Congress drafted the ‘mass action’ provision of CAFA primarily to cover actions brought by multiple plaintiffs in states such as Mississippi that ‘do not provide a class action device.’” *Id.* (citing 151 CONG. REC. S1151 (daily ed. Feb. 9, 2005) (statement of Sen. Reid); 151 CONG. REC. S1081 (daily ed. Feb. 8, 2005) (statement of Sen. Lott)).

336. *See id.* at *2 n.2. *But see supra* notes 320–21 and accompanying text (noting that *Kitazato v. Black Diamond Hospitality Investments, LLC* adopted the reasoning of *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*).

337. *Anwar*, 2009 WL 5103234, at *10.

338. *See id.* at *9 (“Derivative Plaintiffs—as well as plaintiffs in any action—are the ‘master[s] of the complaint,’ free to ‘preclude removal by electing to disregard an available federal dimension of a claim.’” (quoting *Segal v. Varonis Sys., Inc.*, 601 F. Supp. 2d 551, 552 (S.D.N.Y. 2009))).

339. *Id.* at *11.

340. *See id.* (“Defendants have, in fact, argued—and, in effect, conceded—that individual investors in the Funds have no right to bring a direct action.” (citing Letter to the Court from

The court similarly dismissed the same argument used against a direct claim by the investment fund Fairfield Sentry Ltd.³⁴¹ This direct action alleged injury to the corporate entity itself and thus “belongs exclusively to the corporation.”³⁴² The court was particularly concerned that, if the defendants were able to transform such a direct action into a CAFA mass action, “literally any company, public or private, with more than 100 shareholders could be deprived of its chosen forum and haled into federal court.”³⁴³ The judge declined to transform a derivative action into a mass action solely because of the presence of more than 100 shareholders.

As in *CalPERS*, the *Anwar* court refused to cobble together a mass action from a complaint with a few plaintiffs or only a single plaintiff. Yet, the district court ironically, and perhaps only rhetorically, used *Caldwell*’s complaint-piercing to find against CAFA jurisdiction.

The four cases discussed in this section all evidence a tension between arguments based on a strict reading of CAFA’s language, specifically “claims of . . . persons,” and a broader reading aided by the Senate Report. *Caldwell* and *Kitazato* also show that some courts have elided over any distinction between class and mass actions, using representative plaintiffs as an invitation to seek out 100 parties. Courts have not yet followed *Caldwell* en masse, but as *Kitazato* and even *Anwar* show, judges may be more receptive to the Fifth Circuit’s reasoning than the results in these cases suggest.

D. Three Ways To Count to 100

This part has examined three questions that derive from ambiguities in the language of the CAFA mass action provision. These problems begin

Mark G. Cunha at 7 n.7, *Anwar v. Fairfield Greenwich Ltd.*, Nos. 09 Civ. 0118, 09 Civ. 2366 (Ferber), 09 Civ. 2588 (Pierce), 09 Civ. 5012 (Morning Mist), 09 Civ. 5650 (Sentry) (S.D.N.Y. Oct. 9, 2009)). The judge also rejected an argument by the defendants that CAFA’s “absence of an enumerated exclusion for derivative actions,” read in contrast to the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.), meant that Congress intended derivative suits to fall within CAFA’s scope. *See Anwar*, 2009 WL 5103234, at *11. The judge insisted that Congress did not need to clarify in CAFA “what is obvious in black letter law—that a corporate party to a lawsuit is considered one entity or person.” *Id.* at *12.

341. *See Anwar*, 2009 WL 5103234, at *4 & n.5 (detailing the liquidation of the fund and the substitution of the fund’s liquidator as plaintiff, which the judge declared irrelevant to the motion to remand).

342. *Id.* at *13 (citing *Bank of Am. Corp. v. Lemgruber*, 385 F. Supp. 2d 200, 224 (S.D.N.Y. 2005)).

343. *Id.* (quoting Memorandum of Fairfield Sentry Ltd. at 2, *Anwar v. Fairfield Greenwich Ltd.*, Nos. 09 Civ. 0118, 09 Civ. 2366 (Ferber), 09 Civ. 2588 (Pierce), 09 Civ. 5012 (Morning Mist), 09 Civ. 5650 (Sentry) (S.D.N.Y. Dec. 23, 2009)); *see also* Sarah S. Gold & Richard L. Spinogatti, *Madoff Litigation Tests Limits of Removal Under CAFA*, N.Y. L.J., Feb. 10, 2010, at 3 (“As a matter of statutory construction, the *Anwar* decision is sound. The court was certainly correct in pointing out that derivative actions brought in a company’s name are distinct from direct investor actions. . . . CAFA is not the vehicle for bringing derivative actions into federal court, whatever the policy merits for doing so may be.”).

with textual ambiguity but also stem from fundamental similarities between class and nonclass aggregate litigation, as well as the broad intent voiced by Congress in the Senate Report—a source that not all courts accept as authoritative. Two lines of cases—*Bullard* and *Cooper*, and *Tanoh*—have adopted strict readings of the statute, even if the result contradicted the presumed intentions of CAFA’s drafters. In the third line of cases—*Caldwell*, *Kitazato*, *CalPERS*, and *Anwar*—the tensions among the statutory language, statutory intent, and nature of aggregate litigation stand out even more strikingly. CAFA was designed to capture cases of “national importance,” and the mass action provision was founded on the idea that some nonclass cases involving multclaimant disputes are “class actions in disguise.” Yet applying the statute’s ambiguous language can leave some disguised class actions in federal court and, at the same time, can leave fractured mass actions in federal court. The reasoning employed by the courts discussed above shows that, as currently written and practiced, the numerosity requirement will continue to breed uncertainty as litigants battle over the extent of the device. In Part III, this Note proposes readings of CAFA’s statutory ambiguities that attempt to resolve the issues presented by the ambiguous statutory language.

III. COUNTING TO 100: A LIMITED READING OF THE MASS ACTION PROVISION

The cases discussed in Part II all reveal that ambiguities in the language of CAFA’s mass action provision make counting to 100 a far more difficult endeavor than would be expected. Specifically, the phrases “claims of . . . persons” and “proposed to be tried jointly” open themselves up to competing interpretations. In *Bullard* and *Cooper*, courts concluded that joining more than 100 plaintiffs to a single complaint satisfied CAFA’s requirement that claims must be “proposed to be tried jointly.”³⁴⁴ The latter case also held that subsequent machinations by the defense could not destroy a mass action once it had been created—even if it goes forward in 100 or more separate trials.³⁴⁵ In *Tanoh*, seconded by the recent cases of *Brown* and *Mobley*, courts have applied a similarly strict reading of the statute to plaintiffs who join fewer than 100 parties.³⁴⁶ These courts have properly rejected the arguments made by defendants to recognize that separate actions, none of which individually constitutes a mass action, together satisfy the statute’s requirements. Finally, in *Caldwell* and the cases that followed it, courts offered differing interpretations of CAFA’s phrase “claims of . . . persons.”³⁴⁷ The Fifth Circuit in *Caldwell* equated this term with the “real parties in interest” whose interests were being advanced by the Louisiana Attorney General, but who were not formal

344. See *supra* Part II.A.

345. See *supra* notes 152–70 and accompanying text.

346. See *supra* Part II.B.

347. See *supra* Part II.C.

parties to the suit.³⁴⁸ The court in *Kitazato* seemed to adopt this reasoning, but did not find a mass action as *Caldwell* had.³⁴⁹ These courts glossed over any distinction between these two terms and, as a result, opened the door to CAFA's "claims of . . . persons" having far wider connotations than are appropriate. In *Anwar* and *CalPERS*, courts closed the door on this reading of the statute.³⁵⁰ *Anwar* especially acknowledged that if defendants succeeded in equating CAFA's persons with "real parties in interest," nearly any case involving, for example, a corporation with 100 or more shareholders, would be subject to the mass action provision.³⁵¹ These two cases were correct to forestall this line of argument.

All of these cases show that creative lawyers for both defendants and plaintiffs have been able to make the clear number 100 far from clear in application. Their arguments stem primarily from the statute's ambiguous language,³⁵² but expansive readings of CAFA have also taken license from the legislative history, which indicates Congress's clear intent that the mass action reach as broadly as possible.³⁵³ These arguments also depend on fundamental similarities between class and nonclass aggregate litigation—similarities that prompted Congress to enact the mass action statute in the first place.³⁵⁴ The confluence of these three factors makes the numerosity requirement a bone of contention as parties dispute whether their case is subject to federal jurisdiction.

This Note suggests a reading of the statute's two key terms—"claims of . . . persons" and "proposed to be tried jointly"—that aims to clarify the task of counting to 100 and that best rationalizes the statute, its legislative history, and the similarities between class and nonclass aggregate litigation. As to "claims of . . . persons," courts should read this phrase to apply strictly to formally joined parties. This reading of the statute best comports with the entirety of CAFA's text, as well as the intentions of Congress. As to "proposed to be tried jointly," courts should limit their inquiry to formal parties to a single action, or to claims that have formerly and properly been consolidated for trial. This proposal does lead to the bizarre results in *Tanoh* and *Cooper*, where cases with ninety-nine plaintiffs remained in state court, while, in federal court, a mass action could conceivably result in 100 separate trials. Of the bad options, this reading best accommodates the statute as a whole, the intent of Congress, and the traditional rule that the plaintiff is the master of his complaint. However, what these readings show above all is that the very complexity and fluidity of aggregate litigation that spawned the mass action provision has also proved its undoing: the mass action numerosity provision is unworkable in practice.

348. See *supra* notes 281–92 and accompanying text.

349. See *supra* notes 302–21 and accompanying text.

350. See *supra* notes 322–43 and accompanying text.

351. See *supra* notes 333–43 and accompanying text.

352. See *supra* Part I.C.3.

353. See *supra* Part I.C.2.

354. See *supra* Part I.A; notes 85–87 and accompanying text.

A. "Claims of . . . persons"

1. Cases Examining "Claims of . . . persons": *Caldwell*, *Kitazato*, *Anwar*, and *CalPERS*

CAFA's "persons" is a term open to nearly endless interpretations, and in *Caldwell*, the Fifth Circuit pushed its meaning to the limit. Although it did not elaborate, or even acknowledge its crucial assumption, the *Caldwell* court could not reach its conclusion without equating the "real parties in interest" to a *parens patriae* suit with the statute's phrase, "claims of . . . persons."³⁵⁵ While *Caldwell* did not cite CAFA's language, the cases it relied on are instructive. The Fifth Circuit discussed "real party in interest" within the context of *parens patriae* cases—cases that did not deal with CAFA.³⁵⁶ The "real parties in interest" in those suits possessed the rights asserted, but were not parties that actively consent to litigation.³⁵⁷

This conclusion also relied on the court's ability to look past the labels the plaintiff had applied to its complaint, a decision that at least one commentator has criticized.³⁵⁸ However, this decision was less striking in the context of other *parens patriae* suits. Even courts that disagreed with the Fifth Circuit's bifurcation of the real party-in-interest inquiry based on the relief sought probed into the meat of the complaint.³⁵⁹ Nevertheless, the *Caldwell* court overstated the case law supporting its decision.³⁶⁰

Caldwell's conflation of CAFA's "persons" with the "real parties in interest" of a *parens patriae* suit allowed the court to order a remarkable procedure to govern the case going forward. Faced with only one representative party—the State—the Fifth Circuit ordered the district court to add individual plaintiffs as appropriate.³⁶¹ The circuit court thus dictated the transformation of the litigation from the form chosen by the plaintiff into a radically different one. If the court was correct in its conclusion that the State had no standing to pursue its claims for damages, surely the more appropriate outcome would be to dismiss those claims and allow the plaintiff to determine how to replead them—as a mass action or as a class.³⁶² Indeed, everything about *Caldwell* resembled a class action more than a mass action: it was a case with a representative plaintiff advancing the interests of absent parties.³⁶³ The defendants agreed with this conclusion and appeared to argue more strenuously that the case was a disguised class, not a disguised mass.³⁶⁴ Although the Fifth Circuit

355. See *supra* notes 284–92 and accompanying text.

356. See *supra* note 272.

357. See *supra* note 271.

358. See *supra* notes 252–64 and accompanying text.

359. See *supra* note 272.

360. See *supra* notes 255–64 and accompanying text.

361. See *supra* notes 293–95 and accompanying text.

362. Cf. *supra* note 298.

363. See *supra* notes 20, 23–26, 275–80 and accompanying text.

364. See *supra* notes 247–49 and accompanying text.

downplayed the ramifications of its decision by deferring to the district court on the quotidian matters of case management, *Caldwell* was a remarkable instance of court intrusion into the structure of litigation.³⁶⁵ This stealth certification was founded on the court's unspoken conflation of the ambiguous mass action language with the "real parties in interest" that stood behind the single plaintiff in the action.

Kitazato repeated *Caldwell*'s conflation of a representative plaintiff with the "persons" who constitute a mass action.³⁶⁶ Like the Fifth Circuit, the *Kitazato* court pierced the complaint and equated the real parties in interest—the members of the plaintiff Society—with CAFA's term, "claims of . . . persons."³⁶⁷ As with the Attorney General in *Caldwell*, the Society in *Kitazato* seems more like a class plaintiff than a mass of parties, but as in *Caldwell*, the district court seemed willing to entertain the case before it as a mass action.³⁶⁸ Although the court looked to the members of the society as a mass, it should more appropriately think of them as a class.

Anwar and *CalPERS* provided needed checks on a defendant's desire to search out parties in interest.³⁶⁹ The arguments the defendants advanced in *Anwar* and *CalPERS* are natural heirs to the arguments the Fifth Circuit accepted in *Caldwell* and show how far the mass action would reach if it counted all "real parties in interest." *Anwar* and *CalPERS* were correct to limit their inquiries to the parties in the case caption and forestall the breathtaking potential reach of *Caldwell*'s reading of "claims of . . . persons."³⁷⁰

In addition to potentially making mass action jurisdiction apply to, for example, all corporations with 100 shareholders, *Kitazato* and *Caldwell* dangerously transformed what seemed to be class actions into mass actions, essentially agreeing to certify a class, but outside of the confines of Rule 23.³⁷¹ This extension conflicts with the mass action statute's exception for cases that have been certified as formal class actions.³⁷² The *Kitazato* and *Caldwell* courts ignored this conflict and took their license to act from the

365. See *supra* notes 293–95 and accompanying text.

366. See *supra* notes 311–19 and accompanying text.

367. See *supra* notes 317–18, 320 and accompanying text.

368. See *supra* notes 317–19 and accompanying text.

369. See *supra* notes 327, 333–43 and accompanying text.

370. *Anwar v. Fairfield Greenwich Ltd.*, Nos. 09 Civ. 0118, 09 Civ. 2366 (Ferber), 09 Civ. 2588 (Pierce), 09 Civ. 5012 (Morning Mist), 09 Civ. 5650 (Sentry), 2009 WL 5103234 (S.D.N.Y. Dec. 23, 2009), however, was incorrect to conclude that the mass action provision was intended only to apply to states without an analog to Rule 23 class actions. See *supra* note 335 and accompanying text. During debate, Senator Lott did refer to the experience of Mississippi, which did not have a class device, to argue on behalf of the mass action provision. See *supra* note 92. But neither he, nor any of CAFA's supporters, ever indicated that the mass action was intended to fill such a narrow gap. The argument that the mass action should simply apply to states without a class action rule comes from CAFA's opponents who latched on to the rhetorical devices of the bill's supporters. See *id.* The mass action device does fill the gap of states without class actions, but it was never intended to be limited to this application.

371. See *supra* notes 23–26 and accompanying text.

372. See *supra* note 76 and accompanying text.

broad intent contained in the Senate Report, as well as from recognition that class and nonclass litigation share many common characteristics.³⁷³ But above all, these two courts reached their conclusions because of the ambiguous phrase “claims of . . . persons.”

2. “Claims of . . . persons” Should Be Limited to Parties

As the cases above demonstrate, CAFA’s “persons” is a woefully imprecise term. To rectify this ambiguity, courts should interpret the mass action statute to apply only to “claims of” parties.³⁷⁴ This interpretation of the statute is the most appropriate for several reasons. First, limiting “persons” to parties would harmonize this phrase with the remainder of the mass action provision, which exclusively uses the term “plaintiffs.”³⁷⁵ Second, this reading aligns with the presumptions of Congress, which also used “plaintiffs,” not “persons,” in its discussion of the mass action provision.³⁷⁶ Third, this interpretation removes the possibility of conflict with the mass action’s prohibition against cases that have been formally filed as class actions.³⁷⁷ Additionally, reading “persons” to encompass “parties” is preferable to an interpretation of the term as applying solely to “plaintiffs.”³⁷⁸ Parties can join a case in more ways than formal joinder as plaintiffs, such as through intervention.³⁷⁹ “Party” better captures the full complexity of aggregate litigation, which does not always proceed with neatly aligned parties.

Past the statute’s language and Congress’s intent, this interpretation would eliminate the possibility, raised by *Caldwell*, that mass actions could be used to stealthily create class actions without the judicial scrutiny that device requires.³⁸⁰ “Parties” must consent to litigation—a choice that distinguishes them from the much broader “real parties in interest” that the *Caldwell* court used to create a mass action without a mass.³⁸¹ Courts under this proposed interpretation would be prevented from searching for “100 or more persons” at second or third degrees of remove from the claimants actually before the court.

373. See *supra* Part I.C.2; notes 40–42 and accompanying text.

374. This interpretation could also be codified by an amendment to the statute to read “claims of 100 or more parties.”

375. See *supra* note 118 and accompanying text.

376. See *supra* note 122 and accompanying text.

377. See *supra* note 76 and accompanying text.

378. See *supra* note 119 and accompanying text (discussing the difficulty of creating a vocabulary for aggregate litigation).

379. See *supra* notes 27–33 and accompanying text.

380. See *supra* notes 361–65 and accompanying text.

381. See *supra* notes 23–26, 36–39 and accompanying text.

B. “Proposed to be tried jointly”

1. Cases Examining “Proposed to be tried jointly”: *Bullard*, *Cooper*, and *Tanoh*

Although an appropriate reading of CAFA’s “persons” is possible based on reference to the statute as a whole and Congress’s intent, it is more difficult to resolve the more obvious question raised by the numerosity requirement—how to interpret “proposed to be tried jointly.” Courts have not yet produced a satisfying answer. The solution reached in *Tanoh* placed a strict reading of the statute above Congress’s intent for the statute to be broadly construed.³⁸² *Tanoh* also ignored the realities of the problems of nonclass aggregation: a case with ninety-nine plaintiffs will not present different concerns of due process than a case with 101 plaintiffs.³⁸³ Despite *Tanoh*’s unsatisfying result, this Note argues that, considered as a whole, it is inappropriate to expand the scope of the “proposed to be tried jointly” inquiry outside of the formal bounds of a single action.

The analysis of “proposed to be tried jointly” begins with *Bullard*. On the strict facts of the case, the Seventh Circuit certainly reached the correct result. At its heart, the court’s ruling was a simple and strict application of the plain language of the statute, which easily encompassed this case. *Bullard* was correct to conclude that joining more than 100 parties to a single complaint satisfies the mass action’s “proposed to be tried jointly” requirement. However, Chief Judge Easterbrook’s final dictum takes a dramatic leap outside the facts presented and would potentially transform a huge swathe of informally aggregated actions into mass actions.³⁸⁴ Based on his reasoning, defendants could argue that the proposed use of bellwether trials to help price a larger number of claims fits with the Chief Judge’s conception of a mass action.³⁸⁵ In a way, the Chief Judge is not far off base. Such informally aggregated actions may not be bound by strict rules of preclusion, but a decisive verdict for one side or the other can work a similar effect.³⁸⁶ In this way, the court’s reasoning is grounded on the fundamental similarities between class and nonclass aggregate litigation: a realization shared by Congress and essential to its creation of the mass action provision. Yet, taken most broadly, *Bullard*’s dictum would likely have transformed *Tanoh*, and many other cases, into CAFA mass actions. The Ninth Circuit rejected this result.

Considered apart from the 100-person requirement of the mass action device, though, *Tanoh* was as easy a case as *Bullard*. The claims as a whole involved over 600 people.³⁸⁷ Their injuries occurred in Western

382. See *supra* notes 188–93 and accompanying text.

383. See *supra* notes 36–39 and accompanying text.

384. See *supra* note 145 and accompanying text.

385. See *supra* note 42 and accompanying text.

386. See *supra* note 42 and accompanying text.

387. See *supra* note 174 and accompanying text.

Africa—on the other side of the world from the state court in Los Angeles.³⁸⁸ DBCP litigation was ongoing in multiple states in both state and federal courts involving the same large multinational corporations as defendants.³⁸⁹ The *Tanoh* plaintiffs were even involved in parallel litigation in the state and federal systems in California.³⁹⁰ If CAFA was intended to bring cases of national importance into federal court in order to ensure the free flow of interstate commerce, *Tanoh* would seem to fall squarely within its ambit.³⁹¹

Yet, *Tanoh* was remanded to state court, and the Ninth Circuit reached this result simply by applying the statute as written.³⁹² The Ninth Circuit's reasoning verges on tautology—there are fewer than 100 plaintiffs because no one action has more than 100 plaintiffs—but based on a plain reading of the statute and the complaints, *Tanoh* was a correct result.

However, in order to reach this result, the *Tanoh* court needed to willfully ignore the reality that these cases were a single action in all but the form of the pleadings. Each involved the same plaintiffs' lawyer, the same defendants, and the same facts.³⁹³ In the claims originally brought in federal court, all plaintiffs were joined in a single mass joinder action.³⁹⁴ Moreover, the district court judge that presided over the federal action had the various state actions transferred to him after removal.³⁹⁵ Although he ordered their remand, the district judge was engaging in some informal aggregation of his own.

The Ninth Circuit also limited the applicability of *Freeman* and *Proffitt* more than strictly required.³⁹⁶ Unlike in *Tanoh*, both cases involved claims seeking more than \$5,000,000 for the same class of plaintiffs, but each court heavily emphasized CAFA's intent to cut down on duplicative, artificially structured suits—not simply on suits that skirt the amount in controversy threshold.³⁹⁷ *Tanoh* relied on the language from *Freeman* limiting its holding to situations where plaintiffs seek to expand on, rather than limit, their recovery,³⁹⁸ but the majority of the opinion in *Freeman* focused on the court's determination that the structuring had “no colorable basis” other than to avoid CAFA's jurisdiction.³⁹⁹ *Proffitt*'s reasoning was even more sweeping. The court there argued generally for expanded federal jurisdiction over class actions and cited several cases that did not examine

388. See *supra* notes 174–75 and accompanying text.

389. See *supra* notes 174, 178.

390. See *supra* note 176 and accompanying text.

391. See *supra* note 55 and accompanying text.

392. See *supra* notes 188–89 and accompanying text.

393. See *supra* notes 174–78 and accompanying text.

394. See *supra* note 176 and accompanying text.

395. See *supra* note 176.

396. See *supra* notes 200–23 and accompanying text.

397. See *supra* notes 204, 208, 214–15 and accompanying text.

398. See *supra* notes 220–21 and accompanying text.

399. See *supra* notes 211–15, 217–18 and accompanying text.

the amount in controversy requirement.⁴⁰⁰ Duplication of claims, it held, was the evil against which CAFA aimed, and that gerrymandering should prevent plaintiffs from artificially structuring their complaints.⁴⁰¹ Although these cases were class actions that centered on different sections of CAFA, their reasoning could extend to *Tanoh*.

By dismissing *Bullard* in a footnote, the *Tanoh* court also skirted the potentially all-encompassing scope of Chief Judge Easterbrook's dictum.⁴⁰² Had one of the state court actions gone before a jury, that case would surely exert some preclusive effect on the parallel actions.⁴⁰³ While this preclusion may not have been formal, a jury result would certainly affect the terms of any settlement.⁴⁰⁴ Taking Easterbrook's dictum beyond the *Bullard* facts—and perhaps beyond the judge's own intent—one trial of fewer than 100 plaintiffs would, in fact, try the claims of the larger class.

Tanoh's result is especially perverse in light of the result in *Cooper*. While *Tanoh* concluded with multiple cases with fewer than 100 parties in state court, *Cooper* could result in more than 100 trials of only a single plaintiff in federal court.⁴⁰⁵ But *Cooper* reached its conclusion based on a similar strict reading of the statute.⁴⁰⁶ The court recognized this potentially bizarre result but claimed its conclusion was compelled by CAFA's plain language.⁴⁰⁷ *Cooper* also demonstrated that, as much as CAFA's authors and supporters decry sordid gamesmanship on the part of plaintiffs' counsel, defense lawyers are just as capable of manipulating statutory language to their benefit.⁴⁰⁸

2. "Proposed to be tried jointly" Should Be a Limited Inquiry

Tanoh and *Cooper* each reached results that seem nonsensical given the broad intent behind the mass action provision. This reading is not fully satisfying, but among several poor choices, it is the least bad.

First, the presumptions displayed by Congress point towards a limited reading of "proposed to be tried jointly." CAFA's supporters in Congress explicitly stated that a single complaint would satisfy the "proposed to be tried jointly" component.⁴⁰⁹ Along with Congress's use of the term "plaintiffs" in its discussion of the mass action, this legislative history supports a limited reading of this term. However, these supporters did not state that this joinder was a necessary requirement for mass action

400. See *supra* notes 204–08 and accompanying text.

401. See *supra* note 206 and accompanying text.

402. See *supra* notes 145, 224–25 and accompanying text.

403. See *supra* notes 41–42 and accompanying text.

404. See *supra* note 42 and accompanying text.

405. See *supra* notes 152–59 and accompanying text.

406. See *supra* note 156 and accompanying text.

407. See *supra* notes 169–70 and accompanying text.

408. See *supra* notes 49–53, 85–87 and accompanying text.

409. See *supra* notes 121–25 and accompanying text.

jurisdiction.⁴¹⁰ The Senate Report aggressively signaled its intent that courts read CAFA's language more broadly wherever possible and urged courts not to rely solely on the labels parties apply to their suits in determining whether federal jurisdiction exists.⁴¹¹ Were a court to follow this edict in *Tanoh*, it would surely conclude that the suits compromised a single mass action.

However, this type of analysis conflicts with two of CAFA's clear exclusions—"claims that have been consolidated or coordinated solely for pretrial proceedings" and claims that have been "joined upon motion of a defendant."⁴¹² The former exception precludes courts from creating a mass action simply because the parties are cooperating on discovery across several separate actions. The mass action's restriction on further transfer to MDL proceedings without the majority of the plaintiffs' consent further echoes this exception.⁴¹³

A court that wished to follow Congress's broad intent and aggregate multiple actions into one mass action would likely base its decision on the fact that the several actions would, in fact, proceed as a single case. Factors contributing to this conclusion would likely include common representation, shared discovery, consolidated briefing, and other pretrial matters common across the several actions. However, the statute expressly forbids creating a mass action out of cases "coordinated solely for pretrial proceedings." Thus, attempting to follow Congress's broad intent under these circumstances would conflict with a strict reading of the statute as a whole.

To find a mass action under the *Tanoh* circumstances, a court must also address the statute's exception for claims "joined upon motion of a defendant." In *Tanoh*, the Ninth Circuit concluded that mere removal based upon the argument that a court should find a mass action is, itself, a defense motion, albeit a second-hand one.⁴¹⁴ Even if a court were to treat the removal as an opportunity to consolidate claims sua sponte, it would run into additional procedural hurdles.⁴¹⁵ If the court admits that it only has subject matter jurisdiction over the mass action postconsolidation, then arguably the individual "actions" were never properly "before the court."⁴¹⁶ The court in *Brown* and *Mobley* properly acknowledged these procedural roadblocks and declined to consider ordering consolidation sua sponte when it did not have jurisdiction over the underlying actions.⁴¹⁷

410. See *supra* note 126 and accompanying text.

411. See *supra* notes 54–58, 85–93 and accompanying text.

412. 28 U.S.C. § 1332(d)(11)(B)(ii), (iv) (2006); see also *supra* notes 80–82 and accompanying text.

413. See *supra* notes 83–84 and accompanying text.

414. See *supra* note 191 and accompanying text.

415. See *supra* note 31.

416. See *supra* note 31.

417. See *supra* notes 233–34, 239–40 and accompanying text. However, removing defendants can respond to these issues with arguments founded on additional ambiguous statutory language. CAFA prohibits mass actions from being cobbled together out of claims

Limiting the “proposed to be tried” inquiry to claims that have been formally pleaded together or properly consolidated also retains the traditional rule that a plaintiff is “master of his own complaint.”⁴¹⁸ The *Brown* and *Mobley* court recognized this traditional tenet and declined to allow an expansive reading of CAFA to override this concern.⁴¹⁹

Yet, the reading adopted in *Tanoh* and *Cooper*, and advanced by this Note, still does not satisfy. *Tanoh* was clearly a case of national importance, as CAFA’s framers envisaged, but does not fall under this interpretation of the mass action provision.⁴²⁰ Congress created the mass action provision to capture cases that presented the same problems as class actions but, because of the creativity of enterprising lawyers, did not proceed as formal classes.⁴²¹ Again, *Tanoh* is a clear example of clever structuring to avoid federal jurisdiction. The same creativity that gave rise to the mass action provision, however, makes the numerosity requirement essentially unworkable. Practitioners foresaw the problem presented in *Tanoh* shortly after CAFA’s enactment. Ironically, the creativity of defense lawyers raised equally difficult issues in *Cooper*.⁴²² However, reading CAFA to encompass the claims in *Tanoh*, *Brown*, and *Mobley* goes against the language of the statute as a whole. These courts reached the correct, if unsatisfying, result.

CONCLUSION

Congress passed CAFA’s mass action provision firmly believing that these nonclass aggregate proceedings were simply “class actions in disguise.”⁴²³ To curb the abuses that it saw in this form of litigation, Congress plainly signaled its intent to sweep as many of these actions as possible into federal court. However, Congress embodied its broad intent and realization about the similarities between class and nonclass actions within a deeply ambiguous statute. The wording of the mass action provision makes even the seemingly simple task of counting to 100 a matter for argument and litigation. This Note has examined cases that have pressed differing interpretations of the number 100 as applied to potential

“joined upon motion of a defendant,” but this section, unlike the statute’s pretrial proceedings exception, does not use the term “consolidate.” See *supra* note 31 and accompanying text. This distinction opens the door to an argument that CAFA precludes federal jurisdiction for claims or parties joined under Rules 19 or 20, but not claims that are consolidated upon a motion of the defendant under Rule 42. See *supra* notes 28, 31 and accompanying text. Although Rule 42 does use the term “join,” the language used in the mass action provision is just another example where unclear terms could give rise to competing statutory interpretations. See *supra* Part I.C.3.

418. See *supra* notes 233–34, 240 and accompanying text.

419. See *supra* notes 235, 241 and accompanying text.

420. See *supra* notes 54–55, 174–78 and accompanying text.

421. See *supra* notes 85–87 and accompanying text.

422. See *supra* note 172 and accompanying text.

423. S. REP. NO. 109-14, at 47 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 44; see also *infra* note 85 and accompanying text.

mass actions. Having surveyed these cases, as well as the statute and its background, this Note argues for a strict reading of CAFA's numerosity requirement. Courts should count only parties, and only parties to a single action, when they inquire if a case satisfies the mass action numerosity requirement. This reading is not ideal, but it is the best among bad options. The interpretation of the numerosity requirement that this Note advances would allow plaintiffs to remain in state court with parallel claims of ninety-nine parties, but could also result in "mass actions" that result in over 100 separate trials in federal court. These bizarre results only demonstrate that the realization that prompted the creation of the mass action device is truer than Congress realized. In many ways, nonclass actions are "class actions in disguise"; however, the very malleability that drew Congress's attention also renders any attempt to capture these forms of litigation with a clear, round number impossible. In the context of the CAFA mass action device, there is no one way to count to 100.